Supreme Court, U.S.
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No. 04-_____

In The
Supreme Court of the United States

RODNEY DEAN GATES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES THE ANALOGUE CONTROLLED SUBSTANCE STATUTE UNCONSTITUTIONALLY ALLOW THE SAME BODY WHICH DEFINES THE LAW – THE JUDICIARY – TO INTERPRET THE LAW, THUS VIOLATING THE CONSTITUTIONAL SEPARATION OF POWERS AND DENYING PETITIONER HIS RIGHT TO DUE PROCESS AND A FAIR AND IMPARTIAL TRIER OF FACT.

II. DID THE DISTRICT COURT VIOLATE PETITIONER'S RIGHT TO PRESENTMENT OF AN INDICTMENT, ONLY BY A GRAND JURY, WHEN IT DEFINED TERMS OF ART CONTAINED IN THE INDICTMENT BY THEIR COLLOQUIAL, RATHER THAN STATUTORY, MEANING?

III. MAY A CRIMINAL DEFENDANT RELY IN GOOD FAITH UPON THE GOVERNMENT'S INTERPRETATION OF THE UNITED STATES CODE, AS REPORTED IN THE FEDERAL REGISTER, AS A DEFENSE FOR ALLEGED CRIMES INVOLVING ANALOGUE CONTROLLED SUBSTANCES?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Rodney Dean Gates

Scott Ansaldi

The Government of the United States of America

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REPORT OF THE OPINION OF THE UNITED STATES COURT OF APPEALS

The opinion of the United States Court of Appeals for the Second Circuit for this case is reported at *United States v. Ansaldi*, 372 F.3d 118 (2d Cir. June 16, 2004). (App. 1). There are no other reported opinions involving this case.

STATEMENT OF SUPREME COURT JURISDICTION

Petitioner is requesting that the Court review a decision of the United States Court of Appeals for the Second Circuit. This Court's jurisdiction to review the decision is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Article I, §1

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Article III, §1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Amendment V. Rights in criminal cases

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI. Right to a fair trial

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF PROCEEDINGS AND DISPOSITION

This appeal arises from the events surrounding the indictment, arrest, trial and conviction of Gates and his co-defendant, Scott Ansaldi, for Conspiracy to Sell Misbranded Drugs, Introduction and Delivery For Introduction of a Misbranded Drug in Interstate Commerce, Conspiracy to Distribute Controlled Substances, Conspiracy to Distribute a Controlled Substance Analogue and Money Laundering Conspiracy in the United States District Court for the Eastern District of New York,

Central Islip Division, the Honorable Joanna Seybert presiding. Ultimately, a jury convicted Gates and Ansaldi of Counts Three (Controlled Substance), Four (Controlled Substance Analogue) and Five (Money Laundering) of the indictment. [App. 38]. [Doc. 249].

On April 24, 2000, the United States Government published in its regulations a final rule that GBL was now a List I chemical and may or may not be an analogue to the newly scheduled controlled substance, GHB. Following the publication of this rule, on July 31, 2000, law enforcement officers affiliated with the New York City Police Department ("NYPD") and the United States Drug Enforcement Administration ("DEA"), executed arrest warrants on Gates's co-defendant Ansaldi, as well as indicted alleged co-conspirators John Goetz and Claudine Dematos. After those three individuals were arrested, on August 15, 2000, Federal and local law enforcement officers executed an arrest warrant on Gates in Norcross, Georgia.

Count Three of the third redacted superceding indictment, ("indictment"), stated that the defendants, "did knowingly and intentionally conspire to distribute and possess with intent to distribute GHB, a Schedule I narcotic drug controlled substance." [App. 43]. Count Four of the redacted third superseding indictment (Conspiracy to Distribute A Controlled Substance Analogue) stated that the defendants, "did knowingly and intentionally conspire to distribute and possess with intent to distribute for human consumption GBL, a controlled substance analogue." [App. 44].

Count Five of the indictment (Money Laundering Conspiracy) in this case stated that the defendants, "did knowingly and intentionally conspire to conduct financial transactions that affected interstate commerce, to wit: the transfer of approximately $841,647.72 in monetary instruments, including United States currency, personal

checks and bank checks, which transactions involved the proceeds of specified unlawful activity, to wit: *narcotics trafficking*, knowing that the property involved in such transactions represented the proceeds of some form of unlawful activity, with the intent to promote the carrying on of specified unlawful activity." [App. 44-45].

Gates's trial lasted over a month. At the conclusion of the trial, the jury deliberated for over seven days, but did not reach a decision on Counts 1 and 2. [App. 64-66]. The District Court, with the consent of the parties, took the jury's partial verdict as to Counts 3, 4 and 5. Gates was found guilty on all three counts. [Doc. 249]. Gates subsequently moved for a new trial on all counts under Rule 29 of the Federal Rules of Criminal Procedure on July 3, 2002. [Doc. 196]. The District Court denied the motion. [Doc. 223].

The District Court sentenced Gates and Ansaldi on April 14, 2003. [Doc. 248]. At sentencing, the Court assigned Gates an offense level of 27, with a base offense level of 23 and sentenced him to a prison term of 80 months in custody, along with various other provisions. (App. 71-72). *See also* U.S.S.G. §2S1.1. On April 21, 2003, Gates filed a timely notice of appeal with the Court. [Doc. 254]. Briefs were timely filed and the United States Court of Appeals for the Second Circuit heard arguments from the parties on Monday, January 26, 2004. *See Ansaldi*, 372 F.3d at 118. The Court of Appeals subsequently invited the parties to re-brief two specific questions, both focused on whether or not the Appellants' convictions on Counts Three and Four were consistent with their rights and the proof at trial.

In its supplemental brief, the Government conceded that Gates's convictions on Counts Three and Four, the analogue controlled substance and controlled substance

counts, could not both stand on the same evidence and requested that the Court of Appeals vacate both defendants' convictions on Count Three, the controlled substance count. The Second Circuit did so, but affirmed Gates's convictions for Counts Three and Five, as detailed, *infra*. On June 30, 2004, Gates moved the Court of Appeals to stay its mandate to the District Court so that he might petition this Court for a Writ of Certiorari. That motion was denied and the mandate issued on July 19, 2004.

Gates was scheduled for a re-sentencing hearing before the United States District Court for the Eastern District of New York, Seybert, J., presiding, on September 10, 2004, subsequent to publication of this petition, but prior to its submission to the Court.

STATEMENT OF FACTS

Prior to his arrest, Gates had a business relationship with John Goetz, to supply Goetz, who lived in New York, with a chemical mixture called Verve. Verve included the chemical, Gamma Butyrolactone (GBL), as well as certain other substances like sugar and Goetz and his business partners in New York originally marketed it as a dietary supplement. Gates was a resident of Norcross, Georgia and shipped bottles of the mixture to Goetz in New York City. Once in New York, Goetz and his partner, Ansaldi, marketed, sold and distributed the product through a company called Scott's Supplies as well as on an internet website called invigorating.com. GBL was completely legal to possess, buy, sell and distribute within the United States, without any constraints, prior to April 24, 2000.

On that date, the Government published in its regulations a final rule that GBL was now a List 1 chemical, subject to registration with the Government. The final rule,

regarding placement of GBL in List 1 of the CSA, also stated, however, that "[c]hemical mixtures containing GBL will be treated the same as chemical mixtures containing any listed chemical. Currently, chemical mixtures containing listed chemicals are not subject to regulation." 65 Fed. Reg. at 21646. In 21 U.S.C. §802(32)(B), Congress explicitly stated that GBL *is not* a controlled substance, and is not necessarily a "controlled substance analogue" within the meaning of that statute. Specifically, the statute states, "[t]he designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue." *Id.* In reading the statute in conjunction with the final rule cited, *supra*, Gates concluded that he was not violating any law by selling a chemical mixture containing GBL. Thus, Gates continued to supply the New York group with Verve after April 24, 2000.

On July 31, 2000, law enforcement officers from the State of New York and the Federal Government executed arrest warrants for Ansaldi, Goetz and Dematos. Subsequently, on August 15, 2000, law enforcement officers arrested Gates in Norcross, Georgia, pursuant to a warrant from the United States District Court for the Eastern District of New York. The Government seized a quantity of Verve from Gates upon his arrest and had it chemically analyzed, concluding that Verve did not contain GHB, but only GBL.

Appellants' trial commenced on April 29, 2002 and lasted over a month. Both Gates and the Government solicited expert testimony regarding the chemicals involved in this case. One of the Government's experts, Michelle Camilleri, testified on cross-examination that Verve was not pure GBL, but a chemical mixture, which included Kool-Aid and sugar. [App. 54-56]. Following the

close of evidence, during the jury charge conference, Gates requested that the Court charge the jury, on each of the five counts of the third redacted indictment, that he was not guilty if he acted in the good faith belief that, by selling Verve as a mixture of GBL, sugar, Kool Aid and other ingredients, he was complying with the law as it was stated in the Federal Register on April 24, 2000. Counsel argued that such an instruction would counter the specific intent element included in each of Counts 3, 4 and 5. Although the District Court agreed to offer the instruction as to Counts One and Two, it declined to do so for the remaining counts. [App. 58-59].

The jury convicted Gates and Ansaldi on Counts Three, Four and Five, but deadlocked on Counts One and Two after over a week of deliberation. [App. 64-65].

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT OF CERTIORARI

I. CERTIORARI IS WARRANTED BECAUSE THE ANALOGUE STATUTE DELEGATES LEGISLATIVE DECISIONMAKING POWERS TO THE SAME TRIERS OF FACT WHO ARE CHARGED WITH INTERPRETING IT FOR ITS CONSTITUTIONALITY, THUS DESTROYING THE BALANCED RELATIONSHIP BETWEEN THE LEGISLATIVE AND JUDICIARY BRANCHES AND DENYING PETITIONER HIS RIGHT TO A FAIR AND IMPARTIAL TRIER OF FACT.

A. A Statute Which Transgresses The Separation Of Powers May Be Unconstitutionally Vague

Prior to trial, Gates moved to dismiss Count Four of the redacted indictment, asserting that 21 U.S.C. §813

("Analogue Statute"), and, in turn, Title 21's definition of the term, "controlled substance analogue," were vague and violated the separation of powers among the three branches of the United States Government. [App. 46-50]. *See* U.S. Const. Art. I, §1; Art. II, §1 and Art. III, §1. *See also* 21 U.S.C. §802(32).

"[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 203 (1983). This Court has vigilantly protected citizens from criminal punishment under vague statutes, primarily following the logic that:

> [i]t would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (quoting *United States v. Reese*, 92 U.S. 214, 221, 23 L.Ed. 563 (1875)).

A statute is unconstitutionally vague when it transgresses the fundamental constitutional principle of separation of powers. *Nixon v. Administrator of General Services*, 433 U.S. 425, 443, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977). Where an appellant attacks an act or statute as a violation of the Constitution's separation of powers vis-à-vis an improper delegation, the statute will only survive scrutiny if it "clearly delineates: (1) the general policy of the legislation; (2) the public agency designated to administer the policy; and (3) boundaries of this delegated authority." *American Power Co. v. Securities and Exchange*

Comm., 329 U.S. 90, 105, 67 S.Ct. 133, 91 L.Ed. 103 (1946).

Few statespersons in this country's history had as acute a perspective on the roles and missions of the various branches of government as Chief Justice William Howard Taft, who in 1928 stated:

> in carrying out that constitutional division [of powers] into three branches it is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President, or to the judicial branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. *Hampton v. United States*, 276 U.S. 394, 406, 48 S.Ct. 348, 72 L.Ed.2d 624 (1928).

This Court has previously condoned the delegation of certain powers related to the practice and procedure of the various Federal Courts by Congress *to the Judiciary*, but has done so only when such delegations "[do] not trench upon the prerogatives of another Branch and . . . are appropriate to the central mission of the Judiciary." *Mistretta v. United States*, 488 U.S. 361, 387-388, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989). *See also Hampton* at 406. This Court has generally rationalized Congress's transgression of the traditional barriers between itself and *either* of the other two Branches by citing the occasional necessity to do so in the interest of an orderly Government and, as in *Hampton, supra*, because it understood that the availability of judicial review would curb Congress's efforts to do so when such was not truly a *necessity*. *See e.g., Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 953-54 n. 16, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983).

B. When Congress Delegates Its Duty To Define The Law To The Courts, It Effectively Destroys The Possibility Of Objective Judicial Review Of That Statute

Given the well-defined duties of the Branches and the limited reasons for which this Court has condoned transgression thereof, one of the inherent dangers of Congress's enacting too broadly worded a statute is that it necessarily delegates the obligation to *define* laws, i.e. "exercise the legislative power," to representatives of the Judiciary, whose office the Constitution generally constrains to interpreting laws within the contours and parameters usually defined by the Congress. *Hampton* at 406. *See also Papachristou*, 405 U.S. at 165. Such delegation concomitantly eviscerates the concept of meaningful judicial review of the law, not to mention compromising the objectivity of a criminal defendant's trier of fact, since the body defining the law is now the same one charged with interpreting it. The existence of meaningful judicial review, therefore, must be a core aspect of any effort by Congress to delegate its legislative powers. *See Chadha*, 462 U.S. at 953-954 n. 16.

Delegating the authority to legislate, practically accomplished in this case by allowing triers of fact to define what substances do and do not violate 21 U.S.C. §802(32), presents the constitutionally unacceptable situation of giving one Branch the power to make a law, then allowing it to review its own work without giving another Branch a meaningful check to assure the law's legitimacy. *See Chadha* at 953-954 n. 16. Such powers are hardly the variety of rulemaking powers which *Mistretta* permitted Congress to transfer to the Judiciary, but are instead the type of powers which "trench upon the prerogatives of another Branch," to wit, the Judiciary, and is completely *in*-appropriate to the "central mission of the

Judiciary:" to interpret the laws of the United States against the standards of its Constitution. 488 U.S. at 388.

Such delegation differs from the type of explicit delegation contemplated by this Court in *American Power Co.*, since it lacks any definite standards or, "boundaries of . . . delegated authority." 329 U.S. at 105. Most likely, *American Power Co.* also did not contemplate the Federal Judiciary as a "public agency designated to administer the policy" set forth by Congress when such "policy" was the enactment and definition of the nation's criminal statutes. *Id.*

C. The Analogue Statute Places The Burden Of Defining What Substances Are Outlawed On Triers Of Fact, Rather Than Congress Or An Executive Agency

The Analogue Statute states, "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. §813.

21 U.S.C. §802(32) provides:

> (A) *Except as provided in subparagraph (C)*, the term "controlled substance analogue" means a substance – (i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II; (ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II; or (iii) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system

> that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II. (emphasis added).

Conversely, subparagraph 32(C), referenced in 32(A), states, "[s]uch term does not include – (i) a controlled substance."

The Fifth Circuit has explained that, "§813 . . . operates only by reference to the authority already delegated *to the Attorney General* by the Controlled Substances Act itself." (emphasis added). *See United States v. Granberry*, 916 F.2d 1008, 1010 (5th Cir. 1990). *See also United States v. Washam*, 312 F.3d 926, 931 (8th Cir. 2002). Therefore, the only *lawful* delegation of legislated power within the Analogue Statute may be from the Legislative to the Executive Branch, vis-à-vis the Attorney General. *See Granberry*, 916 F.2d at 1010.

By passing the authority to legislate and define what are and are not "controlled substance analogue[s]" to the courts, as opposed to defining the substance itself or allowing an Executive agency to do so, Congress has obliterated the Judiciary's "prerogative[]" to determine objectively whether or not the law comports with a criminal Defendant's various constitutional rights, particularly his right to a fair trial by an impartial trier of fact and to due process of the laws. *Hampton, supra. See also* U.S. Const. Amend.s V & VI. 21 U.S.C. §802(32) compels triers of fact to determine, on an *ad hoc* basis, what is and what is not a "controlled substance analogue," for the purpose of enforcing 21 U.S.C. §813, without giving the ordinary citizen fair warning of what is and is not a "controlled substance analogue." The statute then allows the same triers of fact who defined the crime to review its decision in the exercise of its judicial powers. *See Hampton, supra.*

It is particularly troubling that the Analogue Statute purports to have the same application as the rigidly defined Controlled Substances Act, which not only declares the substances and mixtures which it regulates, but has a carefully designed procedure by which additional substances and mixtures may be added to the list, thus providing clear notice to the public in which behavior they may and may not engage. *See* 21 U.S.C. §§802(6), 811 and 812. *See also Touby v. United States*, 500 U.S. 160, 167, 111 S.Ct. 1752, 114 L.Ed.2d 419 (1991); *United States v. Roberts*, 363 F.3d 118, 124 n. 3 (2d Cir. April 1, 2004).

This Court addressed the delegation of lawmaking authority from Congress to the Attorney General in reference to the Controlled Substances Act ("CSA"), 21 U.S.C. §801, et seq. (including §811), in *Touby*, 500 U.S. at 167. *Touby* approved the delegation of authority from Congress *to the Attorney General* in the CSA, but only insofar as it noted that the existence of judicial review and an explicit, detailed procedural scheme protected citizens from the spectre of arbitrary action by the Executive Branch based on that delegation. 500 U.S. at 167. *See also Chadha, supra. Touby* also gave a detailed explanation of the scheduling procedure for controlled substances which assured that Congress's breach of the separation of powers between itself and the Attorney General was both limited and taken with great caution. 500 U.S. at 167. However, none of the various safeguards which this Court held necessary to the preservation of the tripartite separation of powers and the assurance against enforcement of an unconstitutionally vague statute in *Touby*, *supra*, are factors when a trier of fact determines whether or not a particular substance is a controlled substance analogue, even though the Analogue Statute purportedly operates by reference to the CSA. *See* 21 U.S.C. §802(32). *See also Granberry* at 1010.

The lack of procedural standards in the Analogue Statute affects anyone who has any contact with a substance or mixture which might arguably be a controlled substance analogue, as opposed to a controlled substance. There is nothing related to enforcement of the Analogue Statute which is analogous to the pre-scheduling safeguards discussed in *Touby*, *supra*. Moreover, the District Court did not present any of the factors and considerations enumerated in 21 U.S.C. §§811 and 812, and designed to constrain the defining authority's power to define and schedule controlled substances, to the jury in this case when it was deliberating whether GBL was an analogue of GHB. *See e.g.*, *United States v. Garfinkel*, 29 F.3d 451, 458 (8th Cir. 1994).

The Government has defended the Analogue Statute's shapelessness by asserting that the innovativeness and cunning of illegal drug manufacturers necessitates an enforcement device which can forego the bureaucratic process. *See e.g.*, *United States v. Hofstatter*, 8 F.3d 316, 322 (6th Cir. 1993). Surely, however, this argument invokes *Papachristou*'s disapproval of a lawmaking authority being able to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large." 405 U.S. at 165. The peril which inheres in 21 U.S.C. §802(32)'s nebulous definition of a "controlled substance analogue" is its failure to give citizens fair warning as to whether or not a particular substance or mixture fits the definition, *prior to* use, purchase or sale, at the risk of their own liberty. *Kolender*, *supra*.

The Second Circuit's holding that, upon review of the record, GBL has a similar atomic structure to GHB and, therefore, Gates committed a crime by dealing in it, sharply demonstrates the consequence of the statute's lack of fair warning to the citizenry. *Ansaldi*, 372 F.3d at 124. A

citizen could have the opportunity to purchase, sell, consume, etc., GBL knowing, as the Second Circuit and the Government concede, that GBL *is not* a scheduled controlled substance and therefore may reasonably conclude that their behavior is lawful. Even so, that citizen, even aware that he is using a non-controlled substance for human consumption, still cannot ascertain with any certainty whether or not he is complying with the law because it is left to the trier of fact to determine, *ex post facto* and with the benefit of testimony, scientific analysis, etc., whether or not the substance *is similar enough* (either in structure or effect) to a controlled substance to violate the Analogue Statute. A reading of *Touby* suggests that the CSA's delegation of scheduling power to the Attorney General is constitutional *precisely because* such factors come into play *before* a substance becomes unlawful so, therefore, where the opposite situation exists – a lack of such safeguards – so too is there a lack of constitutionality inherent in the statute's delegation of power. *See Touby, supra.*

Nor does the scenario change if that same citizen, presumably with a multidisciplinary schooling in chemistry, the most current laws of the United States and human biology, were familiar with the atomic dimensions or effects of the two substances. *Roberts*, 363 F.3d at 124 n. 3. One simply cannot predict with any degree of certainty what a jury will or will not determine contains the requisite similarity to a controlled substance to be an analogue. 21 U.S.C. §802(32)(a). The statute's standards simply leave a citizen, and perhaps triers of fact, to make their best guess – rather than be secure in knowing – whether or not a substance is a "controlled substance analogue," and, consequently, whether or not they are breaking the law by involving themselves with it. *See Papachristou, supra.* This Court must not allow *that* to be the standard

by which that citizen might be deprived of his liberty, in Gates's case, for multiple years of his life.

The logic in removing the Judiciary from the process of defining laws is so that, once defined, the laws can be tested by objective judicial review. *See Chadha* at 953-954 at n. 16. *See also Marbury v. Madison*, 5 U.S. 137, 2 L.Ed. 60 (1803). Federal Courts have supported Congress's delegation of its duties to certain, more specialized, Executive agencies, but have also been wary of giving the same opportunity to triers of fact. *See e.g., United States v. Henry*, 136 F.3d 12, 16 (1st Cir. 1998). Federal Courts have disapproved of judges "improperly shifting to the jury the authority to determine," the meaning of terms critical to the guilt/innocence determination in a criminal case. *See e.g., United States v. Paolello*, 951 F.2d 537, 543-544 (3d Cir. 1991). Instead, this Court has acknowledged, Congress has an obligation to preserve the separation of powers by, on its own or with the assistance of the Executive bureaucracy, creating statutes with definite parameters for a trier of fact to test against the appropriate constitutional standards. *Touby, supra.*

Congress has failed to meet its obligation in this case, as a controlled substance analogue is merely what triers of fact say it is at the *end of a criminal trial*, which hardly provides a citizen with fair warning of what to avoid in order to behave in conformity with the Analogue Statute. *See Papachristou, supra.* This dynamic does not comport with *Touby*'s reasoning for holding that §811 *did not* violate the separation of powers doctrine, thus avoiding the constitutional pitfall of creating a statute subject to "arbitrary and discriminatory enforcement." *Kolender, supra.*

Hence, the Analogue Statute does not keep with this Court's previous guidance for schemes which transgress

the constitutional separation of powers and it is important that the Court grant this petition for certiorari in order to determine whether or not its deviation constitutes a violation of Gates's constitutional right to due process of the laws and to a fair trial by an impartial trier of fact. *See* U.S. Const. Art. I, §1, Art. II, §1, Amend.s V & VI. *See also Kolender* at 357.

II. CERTIORARI IS WARRANTED BECAUSE THE SECOND CIRCUIT ERRED IN HOLDING THAT THE TERMINOLOGY IN A CRIMINAL INDICTMENT SHOULD BE READ ACCORDING TO THEIR COLLOQUIAL, RATHER THAN STATUTORY, DEFINITIONS.

A. The District Court Failed To Acknowledge The Difference Between Controlled Substances And Narcotics

At the conclusion of the parties' presentation of the evidence, the Government requested that the Court define the "specified unlawful activity," in which Gates was engaging under Count Five of the indictment, as "trafficking in *controlled substances*." Gates objected, pointing out that Count Five of the indictment enumerates, as the specified unlawful activity underlying the alleged crime of money laundering, not "trafficking in controlled substances," but "trafficking in narcotics." The District Court overruled the objection and instructed accordingly. [App. 59-63].

The CSA distinguishes between the broad category of controlled substances and the far more narrow subcategory of narcotics. *Compare* 21 U.S.C. §802(16) *with* 21 U.S.C. §802(6). *Compare* 21 U.S.C. §841(b)(1)(A) *with* 21 U.S.C. §841(b)(1)(B). 21 U.S.C. §802(17) states:

> [t]he term "narcotic drug" means any of the following whether produced directly or indirectly by

> extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis . . .

Meanwhile, 21 U.S.C. §802(6) states:

> [t]he term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

Thus, all narcotics are controlled substances, but not all controlled substances are narcotics, since some controlled substances are "non-narcotic controlled substances." *See e.g., United States v. Castro*, 401 F.Supp. 120, 122-123 (N.D. Ill. 1975). Consequently, the term "controlled substance," is far broader than the term "narcotic."

Where the crime charged is a felony, "the Fifth Amendment requires that prosecution be begun by indictment." *Stirone v. United States*, 361 U.S. 212, 215, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960). This is because, "[e]ver since *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed.2d 849, was decided in 1887, it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself." *Stirone*, 361 U.S. at 215-216.

When a constructive amendment has occurred, "it cannot be said that with a new basis for conviction added, [the defendant] was convicted solely on the charge made in the indictment the grand jury returned." *Stirone* at 216. Consequently, because "neither this nor any other court" can substitute its judgment for the grand jury's under the Fifth Amendment, a conviction will not stand when a constructive amendment has occurred. *Stirone* at 217. As

Justice Black wrote almost fifty years ago, "[d]eprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Id. See also United States v. Patino*, 963 F.2d 263, 264-265 (2d Cir. 1992).

Recently, this Court has reaffirmed the importance of an indictment as, "the necessary foundation of and predicate for a felony prosecution, conviction, or sentence." *United States v. Villamonte-Marquez*, 462 U.S. 579, 594, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983) (Brennan, J. dissenting). *See also Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Castillo v. United States*, 530 U.S. 120, 123-124, 120 S.Ct. 2090, 147 L.Ed.2d 94 (2000); *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); *United States v. Cotton*, 535 U.S. 625, 627, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002); *Blakely v. Washington*, ___ U.S. ___, 124 S.Ct. 2531, 2542, ___ L.Ed.2d ___ (June 24, 2004). In this case, the grand jury's indictment makes the specific allegation that Defendant laundered money as part of a conspiracy to engage in the trafficking of *narcotics*, as that term is defined in 21 U.S.C. §802(17). However, when the case went to the petit jury, it did not consider an indictment that charged violation of the Federal money laundering statute vis-à-vis trafficking in the narrowly defined category of *narcotics*, but in the broadly defined category of *controlled substances*, which includes narcotics, but includes a considerable amount of non-narcotic controlled substances as well. *See* 21 U.S.C. §802(6).[1]

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[1] Under 21 U.S.C. §841(b)(1)(C), GHB, the controlled substance to which the Government alleged GBL was an analogue, is neither a narcotic, nor a non-narcotic controlled substance. Thus, conviction for a crime related to dealings with an analogue of GHB, when it was alleged in the indictment to be a narcotic drug, was legally impossible, not only

(Continued on following page)

By instructing the petit jury as it did, the District Court violated Defendant's right to be tried only on a presentment or indictment of a grand jury. U.S. Const. Amend. V. *See also Stirone, supra*; *United States v. Wozniak*, 126 F.3d 105, 109 (2d Cir. 1997). The crime described in the Grand Jury's indictment in Count Five was not the crime described by the District Court when it instructed the petit jury as to the same Count. *See Castillo*, 530 U.S. at 123-124 (holding that a statute which defines and punishes differently those crimes committed with firearms, as opposed to those committed with machineguns has established *two distinct crimes*, which must be indicted as such). The Fifth Circuit has previously held that, although the Government may have proven distribution of a particular substance at trial, it had not proven distribution of the substance in the indictment. *United States v. Huff*, 512 F.2d 66, 69 (5th Cir. 1975). In *Huff*, the result of this very slight variance between what was indicted and what was proven at trial was the reversal of the appellant's conviction, "for the chemical and legal definition of these substances is itself technical and requires precision." 512 F.2d at 69.

The Grand Jury did not indict Gates for the charge of laundering money obtained by trafficking in *controlled substances* and, therefore, the District Court should not have presented that charge to the petit jury. *See Stirone*,

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for the obvious reason that GBL, an analogue, is not a narcotic, but because GHB itself is not a narcotic, either. 21 U.S.C. §841(b)(1)(C). Regardless, the District Court's action in constructively amending the language of the indictment to read, "controlled substance," rather than, "narcotics" substantially broadened the allegations beyond what the grand jury had indicted and flies in the face of the Court's recent emphasis on the necessity of precision in the language of the allegations in a criminal indictment. *Stirone* at 217. *See also Apprendi, supra.*

supra. Instead, the District Court should have presented the more strictly defined underlying offense of trafficking in narcotics to the petit jury, just as the Grand Jury had presented that charge to the District Court. *See id. See also Huff* at 69. It is noteworthy that the indictment also completely failed to charge Petitioner with violation 18 U.S.C. §1956, based on the specified unlawful activity of trafficking in *analogue* controlled substances and, even if it had done so, trafficking in *analogue* controlled substances is not listed as one of the specified unlawful activities for which one may be punished under this statute. *See* 18 U.S.C. §1956(c)(7). Given the fact that the Second Circuit held that, "Count Five's reference to 'narcotics trafficking' then admits of only one plausible reading – that it is referring to Defendants' trade *in GBL*," then, Gates's conviction for money laundering, based on *either controlled substance or narcotics trafficking* is invalid, since GBL is neither a controlled substance, nor a narcotic, but merely an *analogue* controlled substance (sometimes). *Ansaldi* at 127. *See also* 21 U.S.C. §§802(32)(A) & (B).

This Court has recently held that 18 U.S.C. §924(c)(1) defined two separate crimes when it described punishment for crimes involving firearms, as opposed to crimes involving machineguns. *Castillo*, 530 U.S. at 122. It should be apparent that, even though narcotics are controlled substances, crimes related to narcotics and crimes related to controlled substances are distinct crimes, subject to different punishments, and therefore must be indicted accordingly. *Id*. An indictment which seeks to prove at trial that a defendant laundered money gained by trafficking *narcotics* excludes any other kind of controlled substances from said allegation. Thus, the Government had the obligation to prove that Gates had trafficked in a substance fitting the definition set forth in 21 U.S.C. §802(16)

to convict Gates on Count Five and did not do so. *Bain*, *supra*.

B. By Vacating Count Three, The Second Circuit Conceded That The Government Had Failed To Prove The Predicate Crime In Count Five

Gates was indicted (and initially convicted) for trafficking in both an analogue controlled substance, to wit, GBL, and a controlled substance, to wit, GHB, based on identical evidence related to his possession of Verve which, subsequent to Gates's arrest and based upon samples seized from the defendants in this case, was discovered to be capable of spontaneous conversion from GBL to GHB. *See Ansaldi* at 122. The fact that Gates's conviction for controlled substance trafficking was vacated means that his money laundering conviction, the specified unlawful activity of which was controlled substance trafficking, cannot stand either. *See United States v. O'Hagan*, 92 F.3d 612, 627-628 (8th Cir. 1996), *rev'd on other grounds*, 521 U.S. 642, 677 n. 24, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997). *See also Ansaldi* at 125-126.

The United States Code is conflicted as to the law governing the present matter, since, although 21 U.S.C. §813 states, "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I," the statutory definition of "controlled substance analogue," explicitly holds that an analogue is "not a controlled substance." *Compare* 21 U.S.C. §813 *with* 21 U.S.C. §802(32)(c)(i). *See e.g.*, *Cleveland v. United States*, 531 U.S. 12, 25, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000) (holding that ambiguities concerning the scope of a criminal statute are resolved in favor of lenity). *See also*

United States v. Kinzler, 55 F.3d 70, 72 (2d Cir. 1995). Therefore, the statutes, read together, *require* the conclusion that, whatever Verve was, it could only be *either* a controlled substance, GHB, *or* an analogue, GBL, but not both. As such, it was appropriate to vacate Count Three, not on the ground of multiplicity, but because there was insufficient evidence to prove Count Three of the indictment. *See Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

The Second Circuit's attempt to uphold the money laundering conviction by arguing that one substance can, at once, be both a controlled substance, GHB, and an analogue controlled substance, GBL, is a conclusion driven far more by the alternative result than by its own rationale. *See Ansaldi* at 126. The decision speaks for itself on this point: had Verve been capable of being GBL and GHB at the same time, the Government, *per* the Second Circuit's concession, could have proven and punished Gates for violation of both the CSA (for GHB trafficking) and the Analogue Statute (for GBL trafficking). *Ansaldi* at 125 n. 5. The two convictions could stand side by side, with neither requiring additional proof, since proof of controlled substance trafficking would already mean that the additional fact that the mixture was not just an analogue, but the actual controlled substance, had been proven. *See e.g.*, *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). The Second Circuit rejected this assertion, however, and later accepted the Government's revised assertion that it had failed to prove trafficking in a controlled substance, but had proven trafficking in a controlled substance analogue. *Id.* at 126. Therefore, the money laundering conviction, predicated upon an allegation that Appellant was trafficking in a controlled substance, suffers the same infirmity as Count Three and *must* suffer the same fate. *O'Hagan*, 92 F.3d at 628.

In spite of all of these facts, and even its own *concession* that, "[d]efendants are, of course, correct that the *statutory* definition of 'narcotic drugs,' 21 U.S.C. §802(17), delineates a subset of the larger class of controlled substances," the Second Circuit nonetheless affirmed the money laundering conviction, holding that the indictment, "does not employ the statutory definition of narcotics, but rather the broader, colloquial meaning of the word – trading in an illicit pharmaceutical." *Ansaldi* at 127. In doing so, the Second Circuit obviously injected its "own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to the suggested changes." *Bain* at 10.

Distinguishing its interpretation of the indictment from a reading based on the statutory meaning of the terms therein, the Court of Appeals held, "the indictment described in detail Defendants' trafficking in GBL and then referenced those events with the shorthand designation of 'narcotics trafficking.' Thus, the term 'narcotics trafficking' *unambiguously* – if inelegantly – referred to the sale of GBL." (emphasis added) *Id.* The Second Circuit again betrays its own logic with its summation, as it holds, on the one hand, that the indictment impliedly alleges trafficking in controlled substances by using a colloquialism, then alleges that the language of the indictment is also "unambiguous[]." *Id.*

The Second Circuit's reasoning as to the "colloquial" use of the term "narcotic" in the indictment stands in apposition to the position of at least one other Circuit regarding the interpretation and meaning of key phrases in a criminal indictment. *Compare Ansaldi* at 128 *with United States v. He*, 245 F.3d 954, 959-960 (7th Cir. 2001). In *He*, after reading 8 U.S.C. §1324(a)(1)(a) (the language of which the indictment essentially tracked) to the jury, the Court responded to the jury's request to clarify the

meaning of two key terms contained therein, "encourage," and "induce," by reading the definitions of those two terms according to *Black's Law Dictionary*. 245 F.3d at 957. The Defendant objected, alleging that, in reading the indictment as a whole, the statutory definitions of those terms broadened the terms in question and therefore constructively amended the indictment. *He* at 958. The Seventh Circuit noted that, "where, as here, a definition of a statutory term can provide jurors with helpful information that does not alter the statutory requirements for conviction, the giving of such a definition is in no way precluded." *Id.* at 958 n. 3. Thus, *He* holds precisely the opposite of the holding in the present matter, where the Second Circuit's position was that the statutory definitions of "narcotic," a term of art used in the indictment, would improperly *narrow* its scope and that, instead, the indictment should be considered in its totality, with Gates left to confront the *implicit* meanings of its terms, rather than considering the definitions of the key terms therein, particularly the term "narcotic" in Count Five. *Ansaldi* at 127.

Gates also notes that he was sentenced according to the Sentencing Guidelines related to his money laundering conviction. [App. 68-72]. *See also* U.S.S.G. §2S1.1. Moreover, the District Court conclusively found that, had it chosen to sentence Appellant for his drug-related conviction, Appellant would have had a maximum base offense level of 20 under the Sentencing Guidelines. *Id. See also* U.S.S.G. §2D1.1. Thus, should this Court reverse Gates's money laundering conviction, it would be appropriate for it to remand this case to the District Court for sentencing consistent with its findings at Gates's sentencing hearing, including the base offense level of 20.

If the Second Circuit's logic is allowed to stand, then the lesson this Court has taken pains to teach and reteach, that an indictment in a criminal case constitutes

more than a mere general declaration of the intent to prosecute, but is, instead, the foundation upon which a criminal case *in toto* must stand or fall, will be totally lost. *See Stirone, supra. See also Bain, supra; Apprendi, supra.* As such, it is *imperative* that this Court grant certiorari and correct the Second Circuit's erroneous affirmance of Appellant's conviction for money laundering, based on trafficking in narcotics. Therefore, this Court should grant certiorari in this case to determine what the appropriate reading of an indictment is: a reading of the document in its totality, with implicit and colloquial interpretations of the allegations being permissible under the Fifth Amendment's grand jury clause, or a plain meaning of the actual words used, according to their statutory meaning and as literally presented by the grand jury. *Compare Ansaldi, supra, with He, supra.*

III. CERTIORARI IS WARRANTED BECAUSE THE DISTRICT COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT GATES WOULD NOT BE GUILTY OF THE CHARGES IN THE INDICTMENT IF HE WAS OPERATING UPON A GOOD FAITH BELIEF THAT HE WAS COMPLYING WITH THE LAW, AS IT WAS STATED IN THE FEDERAL REGISTER.

During the jury charge conference, Gates requested that the District Court charge the jury, on each of the five counts of the third redacted indictment, that Gates was not guilty if he acted in the good faith belief that he was complying with the law as it was stated in the Federal Register on April 24, 2000. *See* 65 Fed. Reg. at 21646. Although the District Court agreed to offer the instruction as to Counts One and Two, it declined to do so for the remaining counts. [App. 58-59].

Gates's good faith argument stemmed specifically from the following passage in the Federal Register's Final Rule regarding placement of GBL in List 1 of the CSA, "[c]hemical mixtures containing GBL will be treated the same as chemical mixtures containing any listed chemical. Currently, chemical mixtures containing listed chemicals are not subject to regulation." 65 Fed. Reg. at 21646. At trial, Gates adduced testimony that the substance which the Government was alleging Gates to be dealing in was not pure GBL, but a chemical mixture, including Kool-Aid and sugar. Thus, the product Gates was shipping to the New York group literally conformed to the Federal Register's statement that "[c]hemical mixtures containing GBL . . . are not subject to regulation." *Id.*

Gates argued that the District Court was required to instruct the jury that his good faith reliance on that statement in the Register was a complete defense to all counts of the indictment, rather than only Counts One and Two. *See e.g., Cheek v. United States*, 498 U.S. 192, 203-204, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991) (holding that a criminal defendant's good faith belief that, based upon his interpretation of the law, his actions do not constitute a crime need not be objectively reasonable to be presented to a jury). *See also Mathews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 887, 99 L.Ed.2d 54 (1988); *United States v. Limberopolous*, 26 F.3d 245, 250-251 (1st Cir. 1994); *United States v. Long*, 977 F.2d 1264, 1272 (1992); *United States v. Carroll*, 518 F.2d 187, 189-190 (6th Cir. 1975); *United States v. Allen*, 127 F.3d 260 (2d Cir. 1997). In Counts Three, Four and Five, the Government alleged that Gates's actions were knowing and intentional violations of the law. Thus, the Government accepted the burden of proving specific intent to violate the law and Gates could negate such proof with a good faith defense. *See United States v. Harting*, 879 F.2d 765, 767 (10th Cir.

1989). The District Court declined Gates's invitation and instructed as to good faith on Counts One and Two – the counts on which the jury did not reach a verdict – only.

Gates argued to the Second Circuit that the District Court's failure to charge the jury regarding his good faith defense deprived him of one of the primary grounds for acquittal which he had presented to the jury and was therefore grossly prejudicial. *Matthews*, 108 S.Ct. at 877. The Second Circuit rejected Gates's argument. *Ansaldi* at 128. Specifically, the Court held that, "[k]nowledge of, or intent to violate, the law is simply not an element of [21 U.S.C. §841(a)(1)]." *Id.* The Court's holding was perplexing as it immediately followed a recitation of the statute, which unambiguously states that an individual must, "knowingly or intentionally" commit the acts in question. *Id.* Moreover, the Second Circuit's addressing the crimes alleged under 21 U.S.C. §841(a)(1) had little effect upon the allegations most affected by the proposed jury charge, Counts Four and Five, the analogue controlled substance and money laundering Counts.[2] Indeed, there is a complete failure in the opinion to acknowledge the considerable difference between a controlled substance, which are in many cases *per se* contraband materials, and analogue controlled substances, which are in most cases common, every day materials (such as household cleaners, etc.) used for different purposes and coincidentally being similar in structure or effect to a controlled substance. To argue that good faith is not a defense to crimes related to this type of substance is to say that the hobby glue manufacturer whose product is used for an inhalant has no such defense,

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[2] The Court's confusion easily could stem from the fact that *nowhere in the redacted third superceding indictment* is there *any reference* to 21 U.S.C. §813.

nor do the multitude of other legitimate businesspeople, like Gates, who possess these substances and market or sell them for purposes that comply faithfully with the law. Such a result is anomalous and surely is not logical in this situation.

The Second Circuit's position also stands in opposition to that of at least three sister Circuits, which have held that good faith is a viable defense to alleged violations of §841. *See Limberopolous*, 26 F.3d at 250-251. *See also Carroll*, 518 F.2d at 189-190. Additionally, the holding fails to speak to why, in light of the undisputed evidence that Gates did not believe he was involved in a controlled substance trafficking ring, good faith was not an appropriate instruction with regard to Count Five, the money laundering count, which at least one other Circuit has approved. *See Long*, 977 F.2d at 1272.

Although the Second Circuit casually dismisses *Harting* and other precedents, like *Cheek*, *supra*, which involve tax evasion, its efforts at distinguishing the two again rely upon the dual notions that Counts Three, Four and Five all relate solely to 21 U.S.C. §841(a)(1) and that, in turn, §841 does not have a *mens rea* element, contrary to the plain language of the statute. In this vein, Gates's prior arguments are equally applicable: there is a *mens rea* element to §841 and §841 *is not* the only statute at issue in Counts Three, Four and Five. Hence, for instance, *Harting*'s assertion that, "'instructions on wilfulness, on aspects of intent, on untruth of representations or fraudulent statements are not sufficient for this purpose,'" is entirely applicable to this case. 879 F.2d at 767 (quoting *United States v. Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc)).

In this case, Gates relied in good faith on the Federal Register's statement that a chemical mixture containing GBL was not affected by the new regulations it announced on April 24, 2000. Gates's good faith belief that he was not bound by the statutes which the Government alleges governed his conduct is a decisive defense to any allegation that he was intentionally violating those statutes. *See Cheek*, 498 U.S. at 203-204. *See also Carroll* at 189-190. In fact, this good faith was Gates's only defense in this case and, therefore, it was perilously harmful error for the District Court not to charge the jury as to that defense on Counts Three, Four and Five. *See Cheek* at 204.

Therefore, this Court should grant Gates's petition to consider whether or not good faith is a defense available to Counts Four and Five of the indictment.

CONCLUSION

WHEREFORE, for the reasons enumerated, *supra*, and any other ground deemed appropriate by this Court, Gates moves this Honorable Court to grant his petition for certiorari, recall the mandate of the United States Court of Appeals for the Second Circuit so that it might consider the issues enumerated, *supra*.

This 14th day of September, 2004.

Respectfully submitted,

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372 F.3d 118

United States Court of Appeals,
Second Circuit.

UNITED STATES of America, Appellee,
v.
Scott **ANSALDI**, Rodney Dean Gates,
Defendants-Appellants.

No. 03-1259L, 03-1273(CON).

Argued: Jan. 26, 2004.
Decided: June 16, 2004.

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Before: NEWMAN and CALABRESI, Circuit Judges, and UNDERHILL,* District Judge.

UNDERHILL, District Judge.

This appeal concerns the application of the Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801 *et seq.*, to the chemical substance gamma butyrolactone ("GBL"). Under certain circumstances – most notably upon human ingestion

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* Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

– GBL converts into the chemical gamma hydroxybutyric acid ("GHB"), a Schedule I controlled substance that is commonly known as a date-rape drug. Scott Ansaldi and Rodney Gates ("Defendants") sold GBL over the internet, and were convicted of conspiracy to distribute GHB, conspiracy to distribute GBL, and conspiracy to launder money. Their appeal requires us to answer two questions: (1) Is the definition of "controlled substance analogue" contained in 21 U.S.C. § 802(32) unconstitutionally vague as applied to GBL? (2) Can a defendant who sells GBL be convicted of both a conspiracy to distribute GBL as an analogue of GHB and a conspiracy to distribute GHB itself?

The question of the vagueness of the term "controlled substance analogue" was recently addressed by this Court in *United States v. Roberts,* 363 F.3d 118, 125-26 (2d Cir.2004). We find the reasoning of that opinion applicable here as well, and therefore do not find the statute vague as applied to the sale of GBL. Because Defendants engaged in only one conspiracy, however, even if they conspired to violate two laws, they could not be convicted on two counts of conspiracy. Accordingly we agree with Defendants that one of the conspiracy convictions must be vacated.

Defendants also make a host of arguments relating to the admission of evidence and the charging of the jury. All are without merit.

BACKGROUND

1. *GHB and GBL*

GHB is a behavioral depressant; upon ingestion, its effects are somewhat similar to those of alcohol. There is also some evidence that it stimulates the body's production

of growth hormones. In 1999, Congress became aware of significant problems stemming from the drug's presence in sexual-assault and driving-under-the-influence cases. In response to these problems, Congress enacted the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000 ("Date-Rape Drug Act"), which resulted in the scheduling of GHB as a Schedule I controlled substance. Pub.L. No. 106-172, 114 Stat. 7 (2000) (codified as amended in scattered sections of 21 U.S.C.).

Congress also noted a significant and growing problem for law enforcement arising from the use of various precursors and analogues to GHB. Specifically, Congress expressed concern about the fact that "[i]f taken for human consumption, common industrial chemicals such as gamma butyrolactone . . . are swiftly converted by the body into GHB." *Id.* § 2. Although Congress did not schedule GBL as a controlled substance, it did make GBL a "listed chemical" subject to various registration requirements. *Id.* § 3 (codified at 21 U.S.C. § 802(34)(X)). It also noted that "[t]he designation of gamma butyrolactone . . . as a listed chemical . . . does not preclude a finding . . . that the chemical is a controlled substance analogue." *Id.* § 5 (codified at 21 U.S.C. § 802(32)(B)).

2. *Defendants' Sale of "Verve"*

In 1999, John Goetz, Claudine Dematos and Ansaldi began using the internet to sell a product called "Invigorating." The active ingredient in Invigorating was GHB, which was then unregulated. The business – named Scott's Supplies – was successful and eventually hired two additional employees – Mitchell Dufanel and Berge Nalbantian.

At some point in 1999, Scott's Supplies learned of pending legislation that would prohibit the sale of GHB and, perhaps in anticipation, ceased selling Invigorating. Invigorating was quickly replaced with a new product, "Verve." Verve was a mixture of water, blueberry Kool-Aid, sugar and – most importantly – GBL. Scott's Supplies purchased Verve exclusively from Gates.

Scott's Supplies continued to purchase Verve from Gates and resell it, even after the passage of the Date-Rape Drug Act. In the summer of 2000, Ansaldi, Gates, Dematos and Goetz were arrested by DEA agents and local police. Goetz died before he could be tried. Dematos entered into a plea agreement, under which she agreed to testify against Ansaldi and Gates. Ansaldi and Gates proceeded to trial.

At trial the government introduced evidence that Gates and Ansaldi sold Verve for human consumption and that both of them had knowledge that GBL converted to GHB upon ingestion. The government also produced an expert who testified regarding the chemical similarity of GBL and GHB molecules. Although the evidence showed that some GBL actually converted to GHB in the bottle – and so Verve, in fact, contained GHB – no evidence suggested that either Ansaldi or Gates was aware of that fact.

The jury convicted Ansaldi and Gates of three of the counts charged in the indictment: (1) Count Three, knowingly and intentionally conspiring to distribute and possess with the intent to distribute the controlled substance GHB; (2) Count Four, knowingly and intentionally conspiring to distribute and possess with the intent to distribute for human consumption the controlled substance analogue

GBL; (3) Count Five, conspiring to conduct financial transactions that affected interstate commerce using the proceeds of a specified unlawful activity. The District Court sentenced Gates principally to 80 months' incarceration and Ansaldi principally to 72 months' incarceration.

This appeal followed.

DISCUSSION

1. *Vagueness*

Defendants contend that the definition of "controlled substance analogue" contained in 21 U.S.C. § 802(32) is unconstitutionally vague as applied to their conduct.[1] We find none of Defendants' arguments persuasive. Regardless of any other ways in which the laws governing controlled substance might be vague, there is one thing they make perfectly clear – the sale of GBL for human consumption is illegal.

A penal statute is void for vagueness if it does not define the criminal offense with sufficient definiteness to allow ordinary people to understand what conduct is prohibited or if the statute is sufficiently indefinite to allow arbitrary or discriminatory law enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). When technical terms are used in a statute, it is proper to look to the relevant science to

[1] This definition was applied to Defendants' conduct on account of the Analogue Statute, 21 U.S.C. § 813, which states: "A controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I."

explain them. *United States v. Jackson,* 968 F.2d 158, 161 (2d Cir.1992).

Before addressing Defendants' arguments, we point out that the subsection defining "controlled substance analogue" specifically states that "[t]he designation of gamma butyrolactone . . . as a listed chemical . . . *does not preclude* a finding . . . that the chemical is a controlled substance analogue." 21 U.S.C. § 802(32)(B) (emphasis supplied). Thus, GBL is one of the substances that the statute actually identifies as a potential controlled substance analogue. Additionally, as noted above, in passing the Date-Rape Drug Act, Congress specifically found that GBL presented a significant law enforcement problem.

Defendants' main argument is that the statute's definition of an analogue is unclear to the extent it requires that the substance's chemical structure be "substantially similar to the chemical structure of a controlled substance." 21 U.S.C. § 802(32)(A)(i). They argue that this vagueness is exacerbated by the fact that the determination whether a substance is an analogue is entrusted to a jury.

It is an interesting question under what circumstances a statute that depends on the resolution of a factual question about which reasonable juries can disagree is specific enough to withstand a vagueness challenge. That question is not presented here. Although a jury did make the determination that GBL was an analogue of GHB, that fact – independent of the jury's confirmation –

is clear enough to have put an ordinary person on notice of the illegality of the sale of GBL for human consumption.[2]

This Court recently addressed this exact issue in the context of the distribution of another precursor to GHB – the chemical 1,4-butanediol. *Roberts,* 363 F.3d 118. *Roberts* held that when there is both readily cognizable similarity between the alleged analogue and the controlled substance prior to ingestion *and* metabolization of the alleged analogue into the controlled substance after ingestion, an ordinary person is sufficiently on notice that the chemicals are "substantially similar" within the meaning of the statute. *Id.* at 125. The *Roberts* panel held that the defendants in that case were sufficiently on notice that 1,4-butanediol – which differed from GHB by two atoms, and converted into GHB upon ingestion – was a controlled substance analogue. *Id.*

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[2] Defendants' briefs attempt to make two separate arguments: (1) that the statute is void for vagueness, and (2) that it is an improper delegation of legislative power. The theory of the latter argument is that it is improper for Congress to allow a jury to determine the scope of the element of a crime – in this case "substantial similarity." These two arguments are in fact one. Juries are often required to determine not only whether certain conduct occurred but also whether the conduct falls within the definition of a statute. In fact, when considering an obscenity law, the Supreme Court has gone as far as saying that "the possibility that different juries might reach different conclusions as to the same material does not render the statute unconstitutional." *Smith v. United States,* 431 U.S. 291, 309, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977). Of course, if a statute's terms are so vague that a jury's determination is likely to be arbitrary, and, consequently, those terms would not allow an ordinary person to understand what conduct is prohibited, then the statute may be unconstitutional. That, however, is nothing more than a restatement of the proposition that statutes must not be unconstitutionally vague – the issue we address here.

Here, the government's expert offered uncontroverted testimony that GBL's chemical structure differed from that of GHB by only three atoms. He also testified that GBL converted into GHB after ingestion. On these facts – both of which were either known to or readily ascertainable by Defendants – the decision in *Roberts* makes clear that Defendants had sufficient warning that GBL was a controlled substance analogue and that its distribution for human consumption was illegal.

Defendants' other arguments on this subject are adequately addressed by the decision in *Roberts*. Accordingly, we conclude that the definition of "controlled substance analogue" is not unconstitutionally vague as applied to GBL.

2. *Multiplicity*

Though neither side raised it on appeal, at oral argument we raised the question whether or not it was possible to convict someone of both conspiracy to distribute GBL and conspiracy to distribute GHB, when the GHB count was predicated only on the fact that GBL converted to GHB in the body. We asked for supplemental briefing on this issue, which both parties subsequently provided. The government, in its supplemental brief, conceded that the two counts were multiplicitous and asked that we vacate the convictions on Count Three – the conspiracy to distribute GHB. We agree that the counts are multiplicitous and that the convictions on Count Three should be vacated.

An indictment is multiplicitous if it charges the same crime in two counts. *United States v. Handakas,* 286 F.3d 92, 97 (2d Cir.2002), *overruled in part on other grounds,*

United States v. Rybicki, 354 F.3d 124, 144 (2d Cir.2003) (in banc). The primary problem is that the jury can convict on both counts, resulting in two punishments for the same crime in violation of the Double Jeopardy Clause of the Fifth Amendment. *United States v. Chacko,* 169 F.3d 140, 145 (2d Cir.1999). When, as here, the same statutory violation is charged twice, the question is whether the facts underlying each count were intended by Congress to constitute separate "units" of prosecution. *Bell v. United States,* 349 U.S. 81, 83-84, 75 S.Ct. 620, 99 L.Ed. 905 (1955).

In this case, it is true that each count undoubtedly required proof of something that the other did not; that is, the counts are not identical. The theory of Count Three required the government to prove that GBL converted to GHB in the body and that Defendants were aware of that. Count Four required proof that Defendants intended to distribute GBL for human consumption, as well as that GBL met the requirements for being a controlled substance analogue. Nevertheless, none of the facts peculiar to each count is relevant to the "unit" of prosecution of the count. It is not the conduct that underlies the offense that matters for multiplicity analysis, but rather "the 'offense' – in the legal sense, as defined by Congress." *Chacko,* 169 F.3d at 146.

Both counts charge a conspiracy in violation of 21 U.S.C. § 846. The act of conspiracy was the agreement to possess and distribute Verve. Possession and distribution of Verve may have been in violation of two laws, but that does not mean that there were two conspiracies. A conspiracy is not the same crime as the underlying violation that it contemplates. "The conspiracy is the crime, and that is one, however diverse its objects. . . . The single

agreement is the prohibited conspiracy, and however diverse its objects it violates but a single statute." *Braverman v. United States,* 317 U.S. 49, 54, 63 S.Ct. 99, 87 L.Ed. 23 (1942) (internal quotation marks omitted).[3] Accordingly, charging one agreement to distribute one substance as multiple conspiracies is not possible, even if the distribution of the substance itself may violate more than one law. *Accord United States v. Peacock,* 761 F.2d 1313, 1319 (9th Cir.1985) (indictment for two conspiracies, one to distribute amphetamine and the other phenyl-2-propanone, was multiplicitous when only one agreement was alleged).

Ordinarily, when a defendant is convicted of multiplicitous counts, the district court should vacate one of the convictions. It is appropriate in certain circumstances, however, for the appeals court to order one of the counts vacated. *See, e.g., United States v. Ben Zvi,* 168 F.3d 49, 58 (2d Cir.1999).

In this case, there are potential problems with Count Three aside from multiplicity. In particular, there is some question whether the government proved that both Ansaldi and Gates knew GBL converted to GHB on

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[3] Ordinarily, courts apply the so-called "Blockburger test," *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to determine whether or not two charged offenses constitute different crimes. That analysis is inappropriate in this case, because there is only one statute at issue, and so, nothing to compare. Rather than determining whether one act falls within two distinct statutes, as in *Blockburger,* we are asking whether two acts constitute one statutory offense.

ingestion.[4] Accordingly, we hereby vacate Defendants' convictions on the charge set forth in Count Three.

3. *Effect on Count Five*

In their supplemental briefs, Defendants argue that, if we vacate the convictions on Count Three of the indictment, we must vacate the convictions on Count Five – the money laundering count – as well. Their argument is that the jury was instructed that the specified unlawful conduct element charged was "controlled substance trafficking," and, once the convictions on Count Three are vacated, that predicate is gone. This argument misunderstands – or badly prejudges – the nature of our holding. A finding of multiplicity, and subsequent vacatur of one of the multiplicitous counts, does not overturn any of the factual findings made by the jury. It simply says that, as a matter of law, the jury found the same thing twice. Thus, the decision to vacate the conviction on Count Three does not undercut any part of the jury's findings that Defendants were trafficking in controlled substances, the predicate for the money laundering charge. We do not hold that Defendants were not trafficking in GHB. We do not even hold that it would be impossible for a defendant to be convicted of both *distributing* GBL and *distributing* GHB in two separate counts.[5] We simply hold that when an

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[4] This has no bearing on our holding on the issue of vagueness. The fact that particular defendants may not have actually known their conduct was illegal does not make a statute vague.

[5] It is worth noting that this question is still open. Although the general rule is that a defendant can be punished for two violations of 21 U.S.C. § 841 arising from one act of possession or distribution of multiple controlled substances, *see United States v. DeJesus*, 806 F.2d 31, 36-37 (2d Cir.1986), we express no opinion whether Congress had a

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indictment charges a conspiracy to distribute both drugs, and that conspiracy is predicated on the existence of one agreement, only one conviction under 21 U.S.C. § 846 is possible. In other words, despite the jury's findings, which we do not disturb, Congress intended only one punishment for this activity.

A slightly stronger version of Defendants' argument is that the potential problems with the government's proof of Count Three noted above, coupled with the hypothetical possibility that the jury may have premised its verdict on Count Five *solely* on the conviction for Count Three, requires us to vacate Count Five. This argument fails because it is not possible, even theoretically, for the jury to have based its Count Five finding of guilt on Count Three without also having based the finding on Count Four. Thus, even were we to find that as a matter of law Defendants did not traffic in GHB, there would still be no basis for overturning the jury's verdict on Count Five.

The jury found that Defendants engaged in a conspiracy to distribute GBL, a controlled substance analogue. The jury was appropriately instructed that, under 21 U.S.C. § 813, a controlled substance analogue is, to the extent intended for human consumption, considered to be a controlled substance. Thus, the jury was aware that, upon finding that Defendants distributed GBL, it had found a sufficient predicate for money laundering. The jury also found that Defendants distributed GHB, but that only means it found *additional* facts – namely, that GBL converted to GHB and that Defendants possessed a

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different intention when the two substances are a controlled substance and its analogue.

culpable state of mind with respect to distribution of GHB. What is not possible is that the jury found that the distribution of GHB was a *separate* act from the distribution of GBL. Consequently, because on the record evidence the jury could not have found Defendants distributed GHB and not GBL, there can be no dispute that the jury found a sufficient factual predicate to support a count of money laundering – namely, trafficking in GBL.

4. *Other Issues*

a. *Constructive Amendment*

Ansaldi and Gates ask us to vacate their convictions on Count Five of the indictment, on the ground that they were convicted in violation of the Fifth Amendment. Specifically, they argue that Judge Seybert improperly amended the indictment in her charge to the jury, thereby allowing the jury to convict Gates and Ansaldi of a crime not charged in the indictment.

Count Five charges Defendants with a money laundering conspiracy. It alleges that they conspired to conduct financial transactions that affected interstate commerce, using the proceeds of unlawful activity. The last element is where the controversy lies. The indictment refers to "proceeds of specified unlawful activity, to wit: narcotics trafficking." The District Judge, however, instructed the jury that they could return a guilty verdict if they found Defendants had used the proceeds from their trafficking in "controlled substances." Ansaldi and Gates argue that the word "narcotics" has a specific meaning, given by 21 U.S.C. § 802(17), which does not include GBL. "Controlled substance," on the other hand, refers to a larger class of substances, including controlled substance analogues like

GBL. Thus, Defendants argue, the District Court's instruction constructively amended the indictment by improperly broadening the scope of the unlawful activity from sale of narcotics to sale of controlled substances.

Constructive amendment of an indictment is a serious error. This Court has held that constructive amendment of an indictment during the course of a trial is a *per se* violation of the Grand Jury Clause of the Fifth Amendment. *United States v. Patino,* 962 F.2d 263, 265-66 (2d Cir.1992). A trial court constructively amends an indictment when it broadens the basis of conviction beyond that charged in the indictment. *Id.* at 265. The Fifth Amendment violation entailed by such amendment is not rendered harmless by the mere fact that the defendant was not "surprised" by the change; every defendant has a right to be tried only on the charges returned by a grand jury. *United States v. Roshko,* 969 F.2d 1, 6 (2d Cir.1992). On the other hand, not every variance between the words of the indictment and the evidence presented at trial or the instructions given to the jury amounts to a constructive amendment. An alteration of the charge is impermissible only if it affects an "essential element" of the offense. *Patino,* 962 F.2d at 266.

Although the case law draws a fine line between those alterations that create constitutionally impermissible amendments and those that are merely permissible variations, this case does not lie near that boundary line. Rather, Count Five of the indictment in this case is perfectly clear and was not at all altered in scope by the District Court's instruction.

Defendants' argument is that narcotics is a narrower class than controlled substances, and therefore, to substitute

the one for the other is to change the scope of the designated substance. Their premise is incorrect. Defendants are, of course, correct that the *statutory* definition of "narcotic drugs," 21 U.S.C § 802(17), delineates a subset of the larger class of controlled substances. Defendants overlook the most straightforward reading of the indictment, however, which does not employ the statutory definition of narcotics, but rather the broader, colloquial meaning of the word – trading in an illicit pharmaceutical.

A review of the indictment as a whole makes it clear that this is the appropriate reading. The indictment first lays out all the allegations concerning Defendants' conspiracy to acquire and distribute GBL. This description of Defendants' business of selling GBL is then incorporated by reference into the beginning of Count Five. Count Five's reference to "narcotics trafficking" then admits of only one plausible reading – that it is referring to Defendants' trade in GBL. Defendants' argument that the District Court broadened the meaning of narcotics as defined by 21 U.S.C. § 802(17) is a strawman. If the word "narcotics" in the indictment had the statutory meaning, there might be a question whether the indictment was impermissibly broadened by the jury charge. That is not the case. Rather, the indictment described in detail Defendants' trafficking in GBL and then referenced those events with the shorthand designation of "narcotics trafficking." Thus, the term "narcotics trafficking" in the indictment unambiguously – if inelegantly – referred to the sale of GBL. There is no obligation to read statutory definitions into every word of an indictment, particularly when the indictment as a whole makes clear that a different meaning is intended.

b. *Good Faith Defense*

A criminal defendant is entitled to a jury instruction on any defense for which there is a foundation in the evidence. *United States v. Allen,* 127 F.3d 260, 265 (2d Cir.1997). That being said, this Court will not overturn a verdict when an instruction is refused, unless the proposed instruction (a) is legally correct, (b) has a basis in the record, and (c) is not present elsewhere in the instructions. *Id.*

Gates and Ansaldi argue that the trial court erred in not granting their request to instruct the jury on the availability of a "good faith" defense to Counts Three, Four and Five of the indictment. They argue that there was evidence in the record that they believed they were breaking no law by selling GBL. They point to several pieces of evidence that they claim demonstrate they did not know they were breaking the law.

First, they point to a DEA regulation stating that, "[c]hemical mixtures containing GBL . . . are not subject to regulation." 65 Fed.Reg. 21,645 (Apr. 24, 2000) (codified at 21 C.F.R. pt. 1310). They argue that they could, and did, read this regulation – albeit incorrectly[6] – as providing that the sale of GBL in a "mixture" of sugar and Kool-Aid was not illegal.

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[6] Defendants do not dispute that this regulation is, in fact, unrelated to the crime with which they are charged. Among other things, the regulation itself points out that Congress expressly stated, in 21 U.S.C. § 802(32), that listed chemicals – such as GBL – might be found to be controlled substance analogues and therefore governed by section 813. In other words, the regulation does not even purport to remove any substance from the realm of criminal conduct.

Second, Defendants point out that GBL is only a controlled substance analogue to the extent it is sold for human consumption. 21 U.S.C. § 813. This, they argue, along with other evidence in the record concerning the marketing of Verve as a cleaning solvent, would have allowed a properly instructed jury to find that Gates and Ansaldi believed they were in compliance with the law by marketing Verve, which consists of a combination of GBL, Kool-Aid and sugar, ostensibly as a cleanser.

What Gates and Ansaldi are attempting to argue as a "defense" is that their mistake of law negates the intent element of the crimes of conviction. Ignorance or mistake of law is not a defense to all criminal charges. For the most part, the prosecution need not show that a defendant knew the illegality of the conduct with which he is charged. *United States v. Golitschek,* 808 F.2d 195, 202 (2d Cir.1986). It is true that some crimes require proof of knowledge of a legal requirement, and, in proving those crimes, the prosecution must prove the requisite legal knowledge.[7] Gates and Ansaldi were not convicted of such a crime.

It is unlawful for an individual "knowingly or intentionally – (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a)(1). Knowledge of, or intent to violate, the law is simply not an element of this offense. *See, e.g., United States v. Fuller,* 162 F.3d 256, 260 (4th Cir.1998) (holding trial court

[7] Even in those cases, ignorance of the law is not an affirmative defense; rather, it is the prosecution's burden to prove knowledge of the law, just as it must prove every other element of the offense. *Golitschek,* 808 F.2d at 203.

correctly refused to instruct the jury on availability of "mistake of law" defense to 21 U.S.C. § 841(a) charge). Defendants rely heavily on the Tenth Circuit decision in *United States v. Harting,* 879 F.2d 765 (10th Cir.1989), a case involving a "good faith" defense to a charge of criminal tax evasion. Criminal tax evasion is perhaps the most well known example of a crime that – unlike a violation of section 841(a) – requires, as part of its *mens rea* element, proof of a defendant's knowledge of his legal duty. *United States v. Bishop,* 412 U.S. 346, 360-61, 93 S.Ct. 2008, 36 L.Ed.2d 941 (1973).

To the extent Defendants might be arguing that a violation of the Analogue Statute, 21 U.S.C. § 813, requires proof that Defendants intended to distribute the substance for human consumption, the jury was correctly charged. The District Court read the Analogue Statute to the jury and instructed them that they had to answer the question whether Defendants "conspired to possess GBL with the intent to distribute GBL for human consumption." No additional instruction was necessary.

Accordingly, Gates and Ansaldi's convictions on Count Four will not be overturned. Their proposed instruction was – to the extent based on a "mistake of law" defense – legally unsupported and – to the extent based on the requirements of the Analogue Statute – adequately given.

c. *Search*

Gates argues that the District Court incorrectly admitted evidence obtained during a search of various storage facilities rented by him, because the search was conducted based on a warrant obtained with improperly procured evidence. Gates argues that, because the supporting pieces

of evidence – rental papers – were improperly obtained, the resulting evidence should not have been admitted because it was "fruit of a poisonous tree." Gates contends that there were two problems with the way the supporting evidence was obtained: (1) officers entered his house with consent that was obtained by coercion, and (2) the officers' subsequent search of his house exceeded the scope of his consent.

The District Court, after holding a suppression hearing, admitted the evidence obtained by the searches, finding that it was procured pursuant to a valid consent search. When suppression is denied, the evidence presented at the suppression hearing is reviewed in the light most favorable to the government. *United States v. Peterson,* 100 F.3d 7, 11 (2d Cir.1996). This Court will not overturn a district court's determination that there was voluntary consent to a search unless that determination was based on clearly erroneous findings of fact. *United States v. Hernandez,* 5 F.3d 628, 632 (2d Cir.1993). Upon review of the record, we cannot say that the District Court's ruling was erroneous.

With respect to consent to enter the house, the evidence at the hearing tended to show that Gates was arrested outside his house by five or six officers, that he was handcuffed, that he was read his *Miranda* rights, and that the officers then asked him whether he would like to give them his "pedigree" information outside or inside his house. Gates agreed to give the information inside the house.

This record supports the District Court's finding that the consent given to enter the house was voluntary. The fact that police drew their guns to effectuate the arrest

does not necessarily establish coercion, neither does the fact that Gates was handcuffed. *See United States v. Kon Yu-Leung,* 910 F.2d 33, 41 (2d Cir.1990); *United States v. Crespo,* 834 F.2d 267, 271 (2d Cir.1987). The fact that Gates was not informed that there were places other than his front yard or his house where the questioning could take place also does not make his consent involuntary. Finally, even considering all these events together – the "totality of the circumstances" – we see little, if anything, to support the conclusion that Gates was coerced into allowing the officers to enter his house. Certainly there is nothing that suggests clear error on the part of the District Court.

With respect to the scope of Gates' consent to a search of his house, the evidence is slightly less clear. One witness testified that an agent first asked Gates "if there were any guns, weapons in the house or any drugs," to which Gates responded "no." The agent then asked, "Do you mind if we search?" Gates replied, "Sure, go ahead." The agent himself initially testified merely that "I asked [Gates] if we have consent to search the house for any guns, money, drugs, et cetera. Mr. Gates said yes." On cross-examination by the defense, however, the agent testified to a colloquy more akin to that described by the first witness.[8]

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[8] Q: You then asked Mr. Gates if there were any drugs, weapons or currency in the house?

A: Yes, sir.

Q: And then you asked if he could have – if you could have consent to search the house?

A: That's correct.

The evidence here – viewed, as it must be, in the light most favorable to the government – supports the finding that the agent essentially asked Gates, "Can we search your house?," to which Gates responded in the affirmative. Although their prior conversation may have led Gates to believe the agents were looking only for weapons, guns and drugs (and, indeed, this may have been all the agents intended to do), what the agents requested, and what Gates – knowingly and voluntarily – permitted, was a search of his house.

Accordingly, we find no error in the District Court's determination that the evidence obtained as a result of the search of Gates' house was properly admitted.

d. *Talk Paper*

Ansaldi appeals the District Court's decision to allow the government to introduce an "FDA Talk Paper" that, among other things, pointed out that GBL converted to GHB when taken orally and described the adverse effects of GBL ingestion. Ansaldi argues that the document was either not relevant or, if relevant, nevertheless inadmissible as hearsay or as unfairly prejudicial under Rule 403 of the Federal Rules of Evidence. None of these contentions has any merit.

The talk paper was admitted by the Court, not for the truth of its contents, but to show Defendants' state of mind. Fed.R.Evid. 801(c). The jury was so instructed. Accordingly, there is no validity to the claim that the evidence was hearsay.

Ansaldi argues that the document was not relevant to show state of mind because there was no evidence that he

had ever seen the document. This argument assumes an incorrect standard for determining relevance. Evidence is relevant if it makes more or less probable the existence of some fact of consequence to the litigation. Fed.R.Evid. 401.

In this case, Dematos testified that she had searched the FDA website for information, that she argued with Goetz about the information she found, and that Ansaldi was present for some of these arguments. Nalbantian testified that he received a copy of the FDA Talk Paper from Dematos.

It is true that the relevance of the talk paper – that is, its ability to make more probable the fact that Ansaldi knew certain information about GBL – depended on the jury's also drawing certain other inferences from the evidence. That circumstance poses no problem under the Federal Rules of Evidence; Rule 104(b) allows for the admission of evidence, even if its relevance is conditioned on a particular fact, so long as there is evidence upon which the jury could find the condition fulfilled.

In this case, Dematos' testimony that she downloaded information from the FDA website and discussed that information in Ansaldi's presence, coupled with Nalbantian's testimony that the FDA talk paper was given to him by Dematos, was sufficient to allow a jury to conclude that Ansaldi was aware of the contents of that paper. Because there was evidence supporting the condition – that Ansaldi learned the contents of the paper – the contents of the paper were relevant to Ansaldi's knowledge of GBL.

Ansaldi argues that this evidence should, nevertheless, have been excluded as unfairly prejudicial under Rule

403. A district court is, of course, in the best position to do the balancing required by Rule 403, and that balancing will not be disturbed unless there is a clear showing of abuse of discretion or that the decision was arbitrary or irrational. *United States v. Salameh,* 152 F.3d 88, 110 (2d Cir.1998). Here, although the paper did contain statements that GBL was harmful (some of which the District Court ordered redacted), it was also relevant to a key element of the prosecution's case. We are unable to conclude that the District Court's balancing of these factors in coming to its decision was either arbitrary or an abuse of discretion.

e. *Hearsay*

Dematos testified, among other things, to various conversations she had with Goetz, who died prior to the trial. The District Court admitted these statements, pursuant to Federal Rule of Evidence 801(d)(2)(E) as non-hearsay statements made by a co-conspirator during and in furtherance of a conspiracy. In order to make this ruling the Court first, as was required, made a finding that the statements were in fact statements of a co-conspirator made in furtherance of and during the conspiracy. *See* Fed.R.Evid. 104(a) (court decides preliminary questions of admissibility); Fed.R.Evid. 801(d)(2) (court may consider proffered statements in determining whether statements are co-conspirator statements).

Gates objected at trial, and now argues on appeal, that those statements should not have been admitted against him because he was not, at least at the time the statements were made, part of the conspiracy. The District Court found otherwise, and our review of the record

reveals that there was sufficient evidence from which the Court could have determined that Gates was in fact part of the conspiracy at the time Goetz's statements where made. Accordingly, we find no error in the District Court's ruling.

f. *GBI Report*

Gates also argues on appeal that the District Court incorrectly excluded a report prepared by the Georgia Bureau of Investigation. The report tended to show that GBL had not converted to GHB in the bottle and was thus relevant to Gates' defense against Count Three. Because we vacate Gates' conviction on Count Three for the reasons stated above, there is no need to reach this issue.

CONCLUSION

For the reasons set forth above, we VACATE Defendants' convictions on Count Three of the indictment. In all other respects the judgment of the District Court is AFFIRMED. The case is REMANDED to the District Court for any resentencing necessitated by the vacatur of the convictions on Count Three.

UNITED STATES DISTRICT COURT

EASTERN District of NEW YORK

UNITED STATES OF AMERICA

V.

RODNEY DEAN GATES

(Assistant U.S. Attorney: James Miskiewicz)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Case Number: CR 00-0891 (JS)

Bruce Harvey & Joseph Beeler, Esqs.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.

X was found guilty on count(s) after a plea of not guilty.
3, 4, 5 (redacted third superseding indictment)

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846, 841(b)(1)(C)	CONSPIRACY TO DISTRIBUTE, AND POSSESS WITH INTENT TO DISTRIBUTE, GHB	7/28/2000	3
21 USC 846, 841(b)(1)(C)	CONSPIRACY TO DISTRIBUTE, AND POSSESS WITH INTENT TO DISTRIBUTE, GBL	7/28/2000	4

18 USC 1956(h), 1956(a)(1)(A)	CONSPIRACY TO COMMIT MONEY LAUNDERING	7/25/2000	5

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ___

X Count(s) 1, 2, and underlying indictments ☐ is X are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 417-02-6291

Defendant's Date of Birth: Jul. 27, 1971

Defendant's USM No.: 51590-019

Defendant's Residence Address:

Defendant's Mailing Address:

4371 Winter Chapel Rd. #2712
Atlanta GA 30360

Apr. 14, 2002
Date of Imposition of Judgment

/s/ Joanna Seybert
Signature of Judicial Officer

JOANNA SEYBERT
Name and Title of Judicial Officer

Apr. 18, 2003
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total total term of **80 MONTHS*** .

X The court makes the following recommendations to the Bureau of Prisons:

THAT THE DEFENDANT BE DESIGNATED TO TALLADEGA, ALA., OR, IF NOT POSSIBLE, MONTGOMERY, ALA., FACILITY.

THAT THE DEFENDANT RECEIVE SUBSTANCE ABUSE TREATMENT WHILE INCARCERATED.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

---

* ALL COUNTS CONCURRENT

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By /s/ _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 YEARS**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

X The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

THE DEFENDANT SHALL ATTEND SUBSTANCE ABUSE TREATMENT, AND CONTRIBUTE TO ITS COST (ACCORDING TO ABILITY TO PAY), AS DIRECTED BY THE PROBATION DEPT. HE SHALL ABSTAIN FROM ALCOHOL AND ILLEGAL SUBSTANCES.

THE DEFENDANT SHALL MAKE FULL FINANCIAL DISCLOSURE TO THE PROBATION DEPT.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
TOTALS	$ 300.00	$ 15,000.00	$

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid in full prior to the United States receiving payment.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ _____	$ _____	

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . .$ _____

X The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A X Lump sum payment of $ 300.00 due immediately, balance due

☐ not later than _____, or
X in accordance with ☐ C, ☐ D, or X E below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ E below); or

C ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in _____ (e.g., equal, weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E X Special instructions regarding the payment of criminal monetary penalties:

FINE OF $15,000.00 PLUS INTEREST IS PAYABLE AT THE RATE OF $500.00 PER MONTH DURING TERM OF SUPERVISED RELEASE.

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments

made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

STATEMENT OF REASONS
(Not for Public Disclosure)

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

X The court adopts the factual findings and guideline application in the presentence report, except (see attachment, if necessary):

THE COURT ADOPTS THE REPORT AS AMENDED BY ADDENDUM, EXCEPT:
¶33 – THE DEFENDANT IS HELD ACCOUNTABLE FOR LAUNDERING ONLY $101,071.32, WHICH ADDS ONLY 1 LEVEL.
¶37, 41, 43, 45 – THESE OFFENSE LEVELS ARE REDUCED TO 27 AS A RESULT.
¶75, 85 – CUSTODY AND FINE RANGES ARE REDUCED AS A RESULT.

Guideline Range Determined by the Court:

Total Offense Level: 27

Criminal History Category: II

Imprisonment Range: 78 to 97 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 12,500 to $ 125,000

☐ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

☐ Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(B)(ii) (or in offenses committed before April 23, 1996, pursuant to 18 U.S.C. § 3663(d)).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3663A(c)(3)(A).

☐ Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property

offense because determining complex issues of fact and related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, pursuant to 18 U.S.C. § 3663A(c)(3)(B).

☐ For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered, pursuant to 18 U.S.C. § 3553(c), for the following reason(s):

STATEMENT OF REASONS
(Not for Public Disclosure)

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of a defendant's substantial assistance, or

☐ for the following specific reason(s):

_____

GAS: JMM: jmm
F. #2000R01512
redact indict.ind

UNITED STATES DISTICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

-against-

SCOTT ANSALDI and RODNEY DEAN GATES,

Defendants.

----------X

SUPERSEDING *INDICTMENT*

Cr. No. *00-0891 (S-3) (JM)*
(T. 21, U.S.C., §§ 331(a), 333(a)(2), 841(a)(1) and 841(b)(1)(C), 846; T. 18, U.S.C., §§ 371, 1956(h), 2 and 3551 *et seq.*)

THE GRAND JURY CHARGES:

INTRODUCTION

At all times relevant to this Superseding Indictment unless otherwise indicated:

1. The Federal Food, Drug, and Cosmetic Act ("FDCA"), Title 21, United States Code, Sections 302 *et seq.*, was enacted by Congress to protect the health and safety of the American public by ensuring, among things, that drugs sold to the public were safe and effective for their intended uses, bore labeling that allowed consumers to use the drugs in a safe manner, and were manufactured in facilities registered with the United States Food and Drug Administration in accordance with procedures that ensured the drugs' purity, consistency, quality, efficacy, safety and reliability.

2. Gamma hydroxybutyrate ("GHB") and gamma butyrolactone ("GBL") are central nervous system depressants.

3. Pursuant to Title 21, United States Code, Section 321(g)(1)(C), GHB and GBL were drugs within the meaning of the FDCA.

4. Pursuant to Title 21, United States Code, Sections 331(a) and 333(a)(2), it was illegal to introduce or deliver for introduction into interstate commerce or to cause the introduction or delivery for introduction into interstate commerce any drug that was misbranded with the intent to defraud or mislead.

5. Pursuant to Title 21, United States Code, Section 352(f), a drug was generally deemed to be misbranded unless it bore labeling that provided adequate directions for its use and adequate warnings against use in those pathological conditions or by children where its use may be dangerous to health, or against unsafe dosage or methods or duration of administration or application, in such manner and form as were necessary for the protection of users.

COUNT ONE
(Conspiracy to Sell Misbranded Drugs)

6. Paragraphs 1 through 5 of this Superseding Indictment are realleged and incorporated herein as if fully set forth herein.

7. On or about and between mid-1999 and August 15, 2000, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants SCOTT ANSALDI, JOHN GOETZ, CLAUDINE

DEMATOS, also known as "Ed Newman," and RODNEY DEAN GATES, together with others, did knowingly and intentionally conspire to introduce and deliver for introduction into interstate commerce drugs, to wit: GHB and GBL, that were misbranded with the intent to defraud and mislead in violation of Title 21, United States Code, Sections 331(a) and 333(a)(2).

8. It was part of the conspiracy that the defendant RODNEY DEAN GATES, together with others, manufactured a drug marketed under the name "Verve" and "Verve 5.0" (hereinafter "Verve"), which contained both GHB and GBL, at a facility located in Norcross, Georgia.

9. It was further part of the conspiracy that the defendant RODNEY DEAN GATES, together with others, sold bulk quantities of Verve to the defendants SCOTT ANSALDI and JOHN GOETZ, and shipped the drug from Norcross, Georgia, to Long Island City, New York.

10. It was further part of the conspiracy that the defendant CLAUDINE DEMATOS created and registered Internet web sites named "invigorating.com" and "buyverve.com' for the purpose of selling Verve throughout the United States.

11. It was further part of the conspiracy that the defendants SCOTT ANSALDI, JOHN GOETZ, CLAUDINE DEMATOS and RODNEY DEAN GATES distributed Verve through Internet sales over websites operated and maintained within the Eastern District of New York.

12. It was further part of the conspiracy that the defendants SCOTT ANSALDI, JOHN GOETZ, CLAUDINE DEMATOS and RODNEY DEAN GATES represented to the public that Verve and other products

containing GHB and GBL representing would increase muscle mass, promote deep sleep and provide users with depressant, euphoric and intoxicating effects, but did not warn fo the known dangers associated with use of the drugs GHB and GBL.

13. It was further part of the conspiracy that the defendants SCOTT ANSALDI, JOHN GOETZ, CLAUDINE DEMATOS, also known as "Ed Newman," and RODNEY DEAN GATES took steps to hide their activities from others, including law enforcement.

14. In furtherance of the conspiracy and to effect the objects thereof, within the Eastern District of New York and elsewhere, the defendants SCOTT ANSALDI, JOHN GOETZ, CLAUDINE DEMATOS, also known as "Ed Newman," and RODNEY DEAN GATES committed and caused to be committed, among others, the following:

OVERT ACTS

a. In or about June 1999, the defendants SCOTT ANSALDI and JOHN GOETZ opened a corporate bank account under the name Scott's Supplies, Inc. at the Long Island City, New York branch of Chase Manhattan Bank.

b. In or about June 1999, the defendants SCOTT ANSALDI, JOHN GOETZ and CLAUDINE DEMATOS created and registered on the Internet a website named "invigorating.com."

c. On or about August 1, 1999, the defendants SCOTT ANSALDI and JOHN GOETZ leased commercial office space located at 10-44 Jackson Avenue, Long Island City, New York, out of which they operated the Internet business known as "invigorating.com."

d. In or about December 1999, the defendants SCOTT ANSALDI and JOHN GOETZ purchased quantities of Verve from the defendant RODNEY DEAN GATES for the purpose of distributing this drug over the Internet site known as "invigorating.com."

e. On or about June 6, 2000, the defendant CLAUDINE DEMATOS, also known as "Ed Newman," created and registered on the Internet a website named "buyverve.com" through which the Verve could be sold.

f. On or about June 22, 2000, the defendants SCOTT ANSALDI and JOHN GOETZ caused the issuance of a $16,000 certified check, drawn on a Scott's Supplies, Inc. bank account and made payable to the defendant RODNEY DEAN GATES, for the purchase of additional quantities of GHB and GBL.

g. On or about July 28, 2000, the defendants SCOTT ANSALDI and JOHN GOETZ, CLAUDINE DEMATOS delivered and caused to be delivered to a United Parcel Service center in Queens, New York, parcels containing bottles of GBL and GHB, which did not bear labels warning of the dangers associated with use of these drugs.

(Title 18, United States Code, Sections 371 and 3551 *et seq.*)

COUNT TWO

(Introduction And Delivery For Introduction Of A Misbranded Drug In Interstate Commerce)

15. Paragraphs 1 through 5 and 8 through 14 of this Superseding Indictment are realleged and incorporated by reference as if fully set forth herein.

16. On or about May 6, 2000, within the Eastern District of New York and elsewhere, the defendants SCOTT ANSALDI, JOHN GOETZ, CLAUDINE DEMATOS, also known as "Ed Newman," and RODNEY DEAN GATES introduced and delivered for introduction into interstate commerce, with the intent to defraud and mislead, a drug, to wit: GHB and GBL that was misbranded.

(Title 21, United States Code, Sections 331(a) and 333(a)(2); Title 18, United States Code, Sections 2 and 2551 *et seq.*)

COUNT THREE

(Conspiracy to Distribute Controlled Substances)

17. Paragraphs 8 through 14 of this Superseding Indictment are realleged and incorporated by reference as if fully set forth herein.

18. On or about and between March 15, 2000 and July 28, 2000, within the Eastern District of New York and elsewhere, the defendants SCOTT ANSALDI, JOHN GOETZ, CLAUDINE DEMATOS, also known as "Ed Newman" and RODNEY DEAN GATES, together with others, did knowingly and intentionally conspire to distribute and possess with intent to distribute GHB, a Schedule I narcotic drug controlled substance, in violation of Section 841(a)(1) of Title 21 of the United States Code.

(Title 21, United States Code, Sections 846 and 841(b)(1)(C); Title 18, United States Code, Sections 3551 *et seq.*)

COUNT FOUR
(Conspiracy to Distribute A
Controlled Substance Analogue)

19. Paragraphs 8 through 14 of this Superseding Indictment are realleged and incorporated by reference as if fully set forth herein.

20. On or about and between March 15, 2000 and July 28, 2000, within the Eastern District of New York and elsewhere, the defendants SCOTT ANSALDI, JOHN GOETZ, CLAUDINE DEMATOS, also known as "Ed Newman" and RODNEY DEAN GATES, together with others, did knowingly and intentionally conspire to distribute and possess with intent to distribute for human consumption GBL, a controlled substance analogue, in violation of Section 841(a)(1) of Title 21 of the United States Code.

(Title 21, United States code, Sections 846 and 841(b)(1)(C); Title 18, United States Code, Sections 3551 *et seq.*)

COUNT FIVE
(Money Laundering Conspiracy)

21. Paragraphs 8 through 14 of this Superseding Indictment are realleged and incorporated by reference as if fully set forth herein.

22. On or about and between March 21, 2000 and July 25, 2000, both dates being approximate and inclusive, within the Eastern District of New York, the defendants SCOTT ANSALDI, JOHN GOETZ, CLAUDINE DEMATOS, also known as "Ed Newman," and RODNEY DEAN GATES, together with others, did knowingly and intentionally

conspire to conduct financial transactions that affected interstate commerce, to wit: the transfer of approximately $841,647.72 in monetary instruments, including United States currency, personal checks and banks checks, which transactions involved the proceeds of specified unlawful activity, to wit: narcotics trafficking, knowing that the property involved in such transactions represented the proceeds of some form of unlawful activity, with the intent to promote the carrying on of specified unlawful activity, in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i).

(Title 18, United States Code, Sections 1956(h) and 3551 *et seq.*)

* * *

[5] case – and I'll give you the cite in a moment – because that seems to be the more appropriate construction canons that one does when reviewing statutes. So I determine that it should be viewed in the disjunctive, so you have three alternatives.

Specifically as to the vagueness argument on count four that the indictment should be dismissed as applied to the defendants here, the due process clauses of the Fifth and Fourteenth Amendments require the legislature to specify the elements of criminal offenses.

United States versus Handakas, which is cited at 286 F.3d 92, a 2002 decision, "a criminal statute is void for vagueness if it fails to give notice of the conduct prohibited, or fails to channel the discretion of the prosecution."

The standard is as follows:

(1) A penal statute must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited; and,

(2) Such must be accomplished in a manner that does not encourage arbitrary and discriminatory enforcement.

Numerous courts have found the analogue statute is clearly and specifically defined in terms readily comprehensible to the ordinary reader, citing United

* * *

[8] presented no evidence to question the structural similarity between GBL and GHB.

Moreover, the government has clearly stated that the only difference in the molecular structure between GBL and GHB is one water molecule.

The government further asserts that the defendants specifically knew that GBL was readily converted to GHB when ingested, and I cite to the government's opposition at page 12.

The government argues, as support for its contention that the defendants knew that their conduct was illegal, therefore effectively negating the void for vagueness as applied argument, that defendants mixed GBL with sugar and flavoring and that they charged $100 per liter for Verve, much more than anyone would pay for a cleaning solvent.

The Court finds that as a general rule the analogue statute is not vague. The language substantially similar is an adequately precise term to put parties on notice that their conduct is illegal.

Numerous courts have come to the same conclusion with respect to analogues for other drugs, including the Eleventh Circuit in United States versus Carlson, which found that the defendants obviously had actual notice that possession of precursor chemicals, MDMA, was prohibited.

* * *

[13] can cross-examine.

The government's application is that you not get up and say that this statute is so indecipherable that persons of ordinary intelligence, ordinary persons, wouldn't be able to know that it applied to them.

MR. HARVEY: Why can't I argue that?

MR. MISKIEWICZ: That's correct, your Honor.

And insofar as they're going to try to elicit testimony from cross-examination that there are chemical companies out there selling this material all the time, it's totally irrelevant for purposes of either knowledge or intent, because unless they're ready to show, whether it's the defendant or through some other proof, that that was the case here, they shouldn't be allowed to inject into the jurors' minds that there's some sort of disparate treatment here. If you're a big corporation selling a solvent, that's okay.

I'm pretty much paraphrasing from Mr. Harvey's brief from yesterday. That's exactly what I'm trying to avoid here.

Clearly intent and knowledge, all of that, is on me and I'm not suggesting that he be precluded from trying to establish, through cross-examination, whether or not his client had an intent.

But when we get into questions like and you know

* * *

[16] about Mr. Harvey – I agree I'm not going to raise in my opening and certainly at this point I have no intention of raising an issue as to big companies get away with it.

But I do intend to say in my opening that the sale of GBL is legal.

MR. HARVEY: Absolutely.

MR. TOMAO: It's only illegal when it's for human consumption and that's one of the issues in the case.

THE COURT: I'm not going to stop you from saying that, if you want to say that. They have to follow the law as I give it to them.

MR. HARVEY: In asking questions about the fact that it is sold in the marketplace, I'm not going to say selective prosecution, you didn't go after them, but it is a fact that the GBL that the government seized in this case came from a company. It was GBL that was in fact seized in 55 gallon drums that you heard evidence about that came from a company. It was legal to purchase that at the time it was purchased.

We surely can show the jury that as a basis of the knowledge and understanding that these defendants had about the legality of the substance that they were both making and selling, that they could buy it legitimately in the marketplace just like a million other people.

THE COURT: I don't think that the government is [17] saying that they couldn't.

What the government is saying is if they put it up for sale for human consumption and possess it with the intent it would be placed on the market for human consumption, that it was illegal.

That's their burden and I'm going to allow you to get into these various issues and I'll hear – other than selective prosecution – big companies and so forth, therefore, it must be a legitimate argument, that I won't permit.

MR. TOMAO: Thank you, your Honor.

MR. HARVEY: Thank you, your Honor.

THE COURT: Let's go forward and bring the jury in. You don't have to stand up for the jury until they're sworn in.

Mr. Miskiewicz, has the government sent up a redacted indictment, if you will, which indicates that the other counts have been dismissed as was previously determined last week or this week?

MR. MISKIEWICZ: I haven't sent up an order to that effect.

THE COURT: Would you please, because I don't want improperly numbered counts and the substance of those counts in any way to prejudice this trial because counsel may inadvertently refer to the former counts and the

* * *

[28] there's five.

MR. MISKIEWICZ: I apologize.

I anticipate you're going to hear testimony that they conspired, first of all, to violate what's known as the Food, Drug and Cosmetic Act.

Now, that is an Act that basically prohibits the sale of a misbranded drug, a drug that doesn't contain adequately warnings of the dangers associated with the use of that drug and the Act prohibits the interstate sale or introduction into interstate commerce of a drug like that and the drug, again, is GBL and GHB.

You're going to hear, I anticipate, that in Georgia the defendant Rodney Dean Gates and others working with him mixed up a number of ingredients to form this drug.

And I anticipate the evidence is going to show that the ingredients water, sugar, Kool-Aid and GBL which, in turn, by virtue of just being mixed with these other substances, also turned into GHB and they marketed this blue substance which the defendant Gates called Verve throughout the United States and sold bulk quantities to the defendant John Goetz and his coconspirator in this case, the defendant in this case, Rodney Dean Gates, – I'm sorry, Scott Ansaldi.

These individuals here in New York then operated [29] over the Internet through a company called Scott's Supplies and sold on a website known as invigorating.com and later on buyverve.com and sold this material all over the United States and they did that pretty much from mid 1999 through August of 2000, and they sold it as a drug, I anticipate the evidence will show you.

The other charges involved here are that the defendants conspired to sell, beginning in March of 2000 when this became a controlled substance, sell GHB, the controlled substance contained in this mixture called Verve, to sell it as a narcotic and to possess it with intent to sell and distribute it as a narcotic.

MR. HARVEY: Excuse me, Judge. I apologize.

THE COURT: It's not necessary for you to make the statement now. Come up.

(Sidebar.)

MR. HARVEY: It is not a narcotic drug under the law and I object to the use of the word narcotic. It is a controlled substance. It is specifically not a narcotic.

The government can't prove that it's a narcotic and hasn't charged that it's a narcotic. It's a controlled substance.

MR. MISKIEWICZ: It's charged as a narcotic drug controlled substance.

THE COURT: That's the language in the [30] indictment.

MR. MISKIEWICZ: It is always used in this District there's nothing unusual surprising about it referring to it as a narcotic.

MR. HARVEY: Then I move to strike. I move he be prohibited from referring to it as a narcotic. Narcotic is defined in the statute. It is not a narcotic. I object to the use of the term narcotic. If it's a colloquialism and you admit that it was, then I object to that. It is not a narcotic under the statute.

THE COURT: That's the language of the statute that was used in the indictment.

MR. HARVEY: No. That was the language that was used in the indictment, it's not the language of the statute.

THE COURT; Doesn't it usually have in the statute narcotic drug controlled substance? That's my understanding.

MR. HARVEY: No. If you –

MR. MISKIEWICZ: It is the common usage in this District and what is in the indictment is that it's a narcotic drug controlled substance.

I'll move on. I don't' think we need to burden or belabor the point. What else is it? It's a drug.

THE COURT: Narcotic is defined, but it's all [31] under the same title. I can understand why the government uses the verbiage he uses. He will drop out narcotic and move on, correct, Mr. Miskiewicz?

MR. MISKIEWICZ: Yes.

(Open Court.)

MR. MISKIEWICZ: Thank you.

The bottom line is that the government is going to prove that these gentlemen worked together, conspired together in New York and in Atlanta to distribute this drug GHB and GBL in a mixture designed for only one purpose, to ingest, to use it as a drug to get high on.

Now, you're going to hear also that the statue provides for something called a controlled substance analogue which in effect means – and you will hear more instructions on this from Judge Seybert at the end of the trial but I have to raise it now with you so you understand factually where this is going.

What it means is that if a substance is chemically similar to what's a Schedule I drug controlled substance in this case, GHB, which the statute provides is a controlled substance, if a substance is substantially similar chemically and it has the same effect, depressant in this case or in others cases hallucinogenic effect, whatever, but in this case it will be the government's evidence and I believe you will hear that these are

* * *

[33] The final charge you will have to evaluate in this case is that the defendants conspired to violate the money laundering statute and in effect what you're going to see is that hundreds of thousands of dollars came into bank accounts and went out of bank accounts and the proceeds of the sale of this drug were then used in financial transactions to promote the continued selling of this drug and that's, in a nutshell, what the money laundering statute is about and you'll hear evidence on that as we go through the case.

Now, my saying it means nothing. How are we going to prove it? First of all, you're going to hear that testimony of a variety of law enforcement agents and detectives.

You're going to hear Detective Richard Pena of the NYPD. He's going to testify that beginning in approximately, let's say, the spring of 2000, he became involved in this investigation and was focused, first of all, on invigorating.com and the allegations of sales of a drug through this company.

And you're going to hear that he made a number of undercover buys through the Internet from Scott's Supplies located at 1044 Jackson Avenue, Long Island City, that he made these undercover buys and received these bottles of Verve and you're going to see the bottles.

* * *

[611] Q And if it's something that somebody made up, and is a substance other than like wood, it's going to have a chemical formula, right?

A That's correct.

Q It also has BAj in it, correct?

A Not in a packet that I have in front of me. That was the last chemical that I just listed that was on here.

Q Okay. Does it have any coloring?

A Just says the artificial flavor and natural flavor, blue 1.

Q That's what I mean. Blue 1, blue 1 is what, if you know?

A I would think it's a coloring.

Q Thank you. Okay. Blue 1 would be a coloring and a coloring would be a chemical, right?

A That's correct.

Q Would it be fair to say that Kool-Aid is a mixture of chemicals?

A That's correct.

Q Thank you.

And if you were mixing Kool-Aid and water, you'd get a blue stance, right?

A That's correct.

Q Much like the blue substance that you see in Verve?

[612] A That's correct.

Q And that would be a mixture?

A That's correct.

Q And when you performed the tests on Verve, you know that it contained a large proportion of water?

A That's correct.

Q And you – I don't know whether you know or whether you tested for the presence of Kool-Aid, if you can?

A No, I did not.

Q But you suspect that's what you figure that was there because you found the packet?

A That's correct.

Q That's why the government introduced it, right?

A Yes.

Q Your best guess as an analytic chemist is this is Kool-Aid in another substance and that's what we were testing for?

A That's correct.

Q But you know most of it is water?

A That's correct.

Q Most of it's water plus what we believe to be Kool-Aid, a mixture of water, Kool-Aid and X, we don't know, X is what we're testing for?

A That's correct.

Q So what we've got, what you're testing in 2-A and

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[693] MR. MISKIEWICZ: Thank you, your Honor.

EXAMINATION (Continued.)

BY MR. MISKIEWICZ:

Q Prior to the break, Ms. Dematos, we're talking about how frequently did you have occasion to see Mr. Ansaldi in the period of time that you met him in 1996?

A Almost every day.

Q Would it be fair to say that you were close friends?

A Yes.

Q With the defendant?

A Yes.

Q And that John Goetz was a close friend of the defendant?

A Yes.

Q Did you have occasion to go to each other's houses or apartments?

A Yes.

Q And how frequently would you do that?

A Scott probably came over our apartment almost every day, and I would go to – Scott would come to our apartment almost every day and once in a while we would stop by Scott's.

Q You're familiar with a company by the name of Scott Supplies?

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[1982] I will indicate that the defendants have raised the defense of good-faith with respect to – or I can put the defendants have been allowed to raise the defense of good-faith with respect to Counts One and Two.

Or do you disapprove of that language? Is there any objection on that? Or just want me to put in what your claims are?

MR. HARVEY: No, judge. Our application was that it apply to all counts, and you are ruling against that.

THE COURT: I am.

MR. HARVEY: I understand that.

So if you put down – I don't mind the way you have it right now, if you are not going to specify anything differently, other than adding Verve where it says GBL.

THE COURT: Okay. I'm not going to add Verve. You can argue that to the jury. There is no basis for me to cull out Verve at this point in time.

MR. TOMAO: In that case, your Honor, then I would ask that you go with respect to Counts One and Two.

THE COURT: Yes.

MR. TOMAO: That will permit us to argue to the jury, although I still have my exception to our earlier requests.

* * *

[2191] conspiring to distribute and possess with intent to distribute a controlled substance.

Count Four of the indictment charges each of the defendants, Scott Ansaldi and Rodney Dean Gates, with conspiring to distribute and possess with intent to distribute a controlled substance analog.

Finally, Count Five of the indictment charges each of the defendants, Scott Ansaldi and Rodney Dean Gates, with knowingly and intentionally conspiring to conduct financial transactions that affect interstate commerce; to wit, the transfer of approximately $841,647.72 in monetary instruments, including United States currency, personal checks, and bank checks, which transactions involved the proceeds of specified unlawful activity, to wit, controlled substance trafficking, knowing that the property involved in such transactions represented the proceeds of some form of unlawful activity, with intent to promote the carrying on of a specified unlawful activity.

Count One is the conspiracy count in this indictment, and I will advise you as follows. The indictment charges that the defendants, Scott Ansaldi and Rodney Dean Gates, knowingly and intentionally conspired to introduce and deliver for introduction into interstate commerce, drugs – namely, gamma hydroxybutyrate, GHB, and

* * *

[2232] crime of the money laundering conspiracy, I must instruct you on what money laundering is.

Section 1956 deals with participation in financial transactions that involve property constituting the proceeds of specified unlawful activity.

Specifically the section provides:

Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct, such a financial transaction which, in fact, involves the proceeds of specified unlawful activity, with intent to promote the carrying on of specified unlawful activity, commits a crime.

Money laundering, which is the object of the conspiracy charged in Count Five, consists of three basic elements.

First, that a person or persons knowingly and willfully conduct financial transactions knowing that the property involved in the financial transactions represents or represented the proceeds of some specified unlawful activity which in this case the indictment alleges was controlled substance trafficking.

Second, that the financial transactions in fact involved the proceeds of controlled substances trafficking.

[2233] Third, that the defendants acted with the intent to promote the carrying on of the specified unlawful activity.

The term conducts includes initiating, concluding or participating in initiating or concluding a transaction.

The term transaction involves the purchase, sale, loan, transfer, delivery or other disposition and with respect to financial institution – with respect to a financial institution includes the deposit, withdrawal or transfer between accounts or any other payment, transfer or delivery by, through or to a financial institution by whatever means effected.

The term financial transaction means a transaction involving one or more monetary instruments in which any way or degree affects interstate commerce or a transaction involving the use of a financial institution which is engaged in or the activities of which affect interstate commerce.

You must determine the question of whether there was an effect on interstate commerce. If you decide that there was any effect at all on interstate commerce, then it is enough to satisfy this element. For example, the use of funds to purchase articles which travel through interstate commerce would be a sufficient effect on [2234] interstate commerce.

If you find that the property involved in money laundering was derived from any wire transfers of funds across state lines, you could find that there was an effect on interstate commerce.

You do not have to decide whether the effect on interstate commerce was harmful or beneficial to a particular business or to commerce in general. The government satisfies its burden of proving an effect on interstate commerce if it proves beyond a reasonable doubt any effect, whether it was harmful or not.

In addition, it is not necessary for the government to show that the defendant actually intended or anticipated an effect on interstate commerce by his actions or that commerce was actually affected. All that is necessary is that the natural and probable consequences of the acts the defendant took would be to affect interstate commerce.

The government must prove beyond a reasonable doubt that the defendant conducted or attempted to conduct a financial transaction with the understanding that the property involved in the financial transaction would be the proceeds of some form of unlawful activity.

I instruct you that this element refers to a requirement that the defendant knew that the property [2235] involved in the transactions represented proceeds of some form, though not necessarily which form of activity, that constitutes a felony under state or federal law. I instruct you as a matter of law, that controlled substance trafficking is a felony.

The government must also prove, beyond a reasonable doubt, that the property involved in the financial transaction the defendant conducted, in fact, constituted the proceeds of specified unlawful activity. Here, the specified unlawful activity is controlled substance trafficking.

Section 1956 of the United States Code deals with conspiracy to participate in financial transactions that involve property constituting the proceeds of specified unlawful activity. As I mentioned earlier in the general conspiracy instructions, a conspiracy is a kind of criminal partnership.

It is a combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means.

The crime of conspiracy is an offense separate and apart from the commission of any offense that may have been committed pursuant to the conspiracy. The same elements apply to Count Five as they did to the conspiracies alleged in Counts One, Three and Four. As

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[2413] THE COURT: Please be seated and we will discuss the last note from the jury.

As you know, the jury has indicated that they cannot agree on Counts One and Two. However, counts three, four and five are in total agreement.

I would assume that would be as to both defendants, but I can make that inquiry, if necessary.

At this point in time, it's obvious that the court can take a partial verdict, but I want to explore that, and the response that I'm going to be giving to the jurors at this time.

What is the position of the government? Under Rule 31, I know I can take a partial verdict. They have been deliberating for seven days.

It's error not to accept it, but I want to seek some input from everyone here, including the defendants.

MR. MISKIEWICZ: I think, your Honor, you have answered the question.

They have been at it for seven days. An Allen charge of some type to go back and continue working would be almost cruel and unusual.

THE COURT: To whom, Mr. Miskiewicz?

MR. MISKIEWICZ: For all concerned.

But I have no objection to the taking of a partial verdict.

* * *

[2417] instructions.

THE COURT: The jury may render a partial verdict with respect to Counts Three, Four and Five, provided you are unanimous with respect to each count for each defendant.

The court will provide further instructions after the partial verdict has been reported.

Anything else?

All in agreement?

MR. MISKIEWICZ: Yes, your Honor.

MR. TOMAO: Yes.

MR. HARVEY: Yes.

THE COURT: All right.

(Jury enters the courtroom at 3:25 p.m.)

THE COURT: Please be seated, if you would, ladies and gentlemen.

We received your last note, and I communicated with you with regard to rendering of a partial verdict. At this time I am going to ask the foreperson to stand and Mr. Baran is going to make inquiry with respect to Counts Three, Four and Five.

So if you would.

THE CLERK: Count Three, conspiracy to distribute controlled substances, 21 USC 846 and 841(b)(1)(C), 18 USC 3551:

[2418] No. 27: How do you find defendant Scott Ansaldi on Count Three of the indictment, guilty or not guilty?

JURY FOREPERSON: Guilty.

THE CLERK: No. 28: How do you find the defendant Rodney Dean Gates on Count Three of the indictment, guilty or not guilty?

JURY FOREPERSON: Guilty.

THE CLERK: Count Four, conspiracy to distribute a controlled substance analog, 21 USC 846 and 841(b)(1)(C), and 18 USC 3551:

No. 29: How do you find defendant Scott Ansaldi on Count Four of the indictment, guilty or not guilty?

JURY FOREPERSON: Guilty.

THE CLERK: No. 30: How do you find the defendant Rodney Dean Gates on Count Four of the indictment, guilty or not guilty?

JURY FOREPERSON: Guilty.

THE CLERK: Count Five, money laundering conspiracy. 18 USC 1956(a)(1)(A)(i), 18 USC 1956(h) and 3551:

No. 31: How do you find defendant Scott Ansaldi on Count Five of the indictment, guilty or not guilty?

JURY FOREPERSON: Guilty.

THE CLERK: No. 32: How do you find the defendant Rodney Dean Gates on Count Five of the [2419] indictment, guilty or not guilty?

JURY FOREPERSON: Guilty.

THE COURT: The foreperson has signed the verdict form; is that correct?

JURY FOREPERSON: Yes.

THE COURT: If you would just have a seat, and, Charlie, please poll the jury on the remaining jurors.

THE CLERK: Juror No. 1, is that your verdict that was just read?

JUROR NO. 1: Excuse me?

THE CLERK: Is that your verdict that we just read?

JUROR NO. 1: Yes.

THE CLERK: Juror No. 2, is that your verdict?

JUROR NO. 2: Yes.

THE CLERK: Juror No. 3, is that your verdict?

JUROR NO. 3: Yes.

THE CLERK: Juror No. 4, is that your verdict?

JUROR NO. 4: Yes.

THE CLERK: Juror No. 5, is that your verdict?

JUROR NO. 5: Yes.

THE CLERK: Juror No. 6, is that your verdict?

JUROR NO. 6: Yes.

THE CLERK: Juror No. 7, is that your verdict?

JUROR NO. 7: Yes.

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[40] should be used for the money laundering and proceeds of drugs.

So notwithstanding the Second Circuit's opinion –

THE COURT: Yes.

I don't agree with your analysis of the Atterson case. It gets back to the issue before the court at this point in time. If you have a level 23, assume that you are capped at the 20, and then you add on $100,000 plus, for the amount of the transaction involved, we are then at a level 24. The knowledge then drives it up three more levels, to a 27.

MR. MISKIEWICZ: Correct, Judge.

THE COURT: If there is nothing else, I'm going to find a level 27 because it is consistent.

And I've heard your arguments and I won't hear any more on that. Therefore, probation, let's make that adjustment. And you will do the necessary estimates for Mr. Ansaldi.

MR. TOMAO: Thank you, Judge.

THE COURT: So the multiple-count adjustment comes out to a 27. Is that correct?

MR. MISKIEWICZ: Your Honor, the count five adjustment would come out to level 27.

THE COURT: Right. Then combine it with the

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[62] So I don't think that comment from Mr. Goetz is worth much. Even if it were admissible as some sort of dying declaration, and I submit it was self-serving and part and parcel of an obligation on Mr. Goetz to find out the person he was talking to and to find out if it was an undercover agent, which it is a very convenient statement but it belies the fact that these guys were involved in an extensive national deliberate scheme to distribute a highly dangerous and toxic drug.

THE COURT: Any statement you would like to make, Mr. Gates, pertaining this issue? Or are you going to defer to your attorney's opposition to the upward departure?

MR. GATES: No, ma'am. Other than I've learned a lot from this whole thing and I've done a lot of changing spiritually and emotionally and made the decision to never let something like this happen again. I'm sorry to have been involved.

THE COURT: As to the government's motion for an upward departure.

Although there is abundant evidence that there was a huge quantity involved based on the records, seizures, as I've said over and over again, and it certainly amounts to more than 10 times the units, I am declining to grant an upward departure. The defendant [63] therefore is at a level of 27, and there is a range of sentence of 78 to 97 months.

That having been said, perhaps, Mr. Gates, you would like to add an additional statement at this time, or would Mr. Beeler or Mr. Harvey like to join in that.

I note that once again you have a number of individuals who made the trip outside of New York State to be here today.

MR. BEELER: Your Honor, I believe the individuals are: Jennifer McLure, who wrote a letter. The defendant's mother, Marlin Lukavich, who wrote a letter. Her husband, Frank Lukavich, is here as well. Dean Gates's father, Rodney Dean Gates, is here. He wrote a letter.

And there were other letters submitted. Other people came to court on other occasions. I think the letters help inform the court about the background of Dean Gates.

Their continued presence here during the trial and on the several dates set for presentencing or sentencing hearings shows that he has roots, he has family support, there is hope for him. And it is certainly our hope that you sentence at the bottom of the guidelines and that you give him an opportunity to get this behind him as soon as possible and to go on to a drug-free life that

* * *

[68] into your life, but that didn't necessarily stop you from engaging in the criminal conduct that you engaged in. You still had the business up and running.

I do hope that her health improves and that you have an opportunity to share a life together, if that is what each of you desires. However, this is a very serious charge.

You don't get a particular substance being designated a controlled substance without extensive hearings, and that was done in Congress. And there was a determination made to keep this substance out of the hands of the general public for consumption. No doubt about it. It is dangerous and it is serious.

Therefore, knowing that there is a need for deterrence and a need for rehabilitation and a need for society to understand the seriousness of this particular crime, the Court will impose at a lower end of the guideline, give you opportunity to rehabilitate yourself without a belief that you will never be released from jail.

I will sentence you to a term of 80 months in custody, to run concurrent on each of the counts of which you have been convicted.

I will impose a $15,000 fine, because I have no idea what your assets are.

[69] Additionally, I impose a term of three years' supervised release.

Let me just double-check on the fine.

I will keep it at the 15.

In addition, special conditions will be regarding that during your three-year supervised release you pay the fine at the rate of $500 per month during the term of your supervision until it is paid in full. That you make full financial disclosure. Once again you have to make them timed, if you want to abide by the supervised release terms.

And that you participate in the substance abuse treatment program with the treatment provider that is approved by the probation department. The treatment can include outpatient residence. And that you shall abstain from all illegal substances. The payment that you make or any availability of third-party payment will offset your costs of this treatment.

I am imposing. A $300 special assessment.

And you are prohibited from possessing a firearm during the course of your supervised release.

Let me check on the special assessment.

Counts three, four, and five. Total.

MR. BEELER: Your Honor?

THE COURT: The designation?

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